INDEX

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

DATE	PROCEEDINGS
12-15-69	Filed Indictment.
12-15-69	Bench warrant ordered.
12-22-69	Milton Adler Esq. assigned as Atty. Under CJA by U.S. Comm. Kessler of Counsel Deft. brought to Count on a Bench Warrant—Pleads not Guilty—Bail fixed in the sum of $2,500—Deft. REMANDED in lieu of bail fixed. $500. Bail fixed by Comm. exanarated. Jan 13, 1970 for Motions— MANSFIED, J.
12-29-69	Filed Warrant of Arrest and executed Dec. 19, 1969.
1-14-70	Trial Begun
1-15-70	Trial Continued and concluded. Jury Verdict Count 1—GUILTY, Count 2 GUILTY Count 3 NOT GUILTY. Defendant continued on present bail of $2,500—REMANDED in lieu of bail fixed. Pre-sentence Investigation ordered. Sentence date 2-19-70 at 10:00 A.M.
1-27-70	Filed remand cited 12-22-69
1-30-70	Filed Notice of Motion for Judgment of Acquittal. Returnable Feb. 19, 1970.
2-5-70	Filed affdvt of THOMAS J. FITZPAYRICK, Asst. U.S. Atty in opposition to deft's motion to set aside the verdict of guilty and to dismiss the indictment, & memorandum of law. (sent to indictment. & memorandum of law. (sent to
2-19-70	Filed copy of Notice of motion filed 1-30-70 & memorandum of law & Deft's reply Brief.
2-19-70	Filed memorandum *** RE: for an order in arrest of Judgment or for a judgment of acquittal *** It is concluded that the congress could and did mean to reach cases like this one. Accordingly deft's motion is denied-so ordered FRANKEL, J. (mailed notice)
2-17-70	Filed Remand with Marshal's return.
2-19-70	Filed Judgment: It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIF-

DATE	PROCEEDINGS
	TEEN (15) MONTHS on each of counts 1 and 2, to run concurrently with each other. Defendant continued on present bail of $2,500 until 4 P.M. on February 26, 1970 at which time the defendant is to surrender to the U. S. Marshal for service of sentence. FRANKEL, J.
2-19-70	Issued commitments and copies.
2-26-70	Deft. surrenders to U.S. Marshal for service of sentence 4 PM
2-27-70	Filed order that the appellant be and hereby is granted leave to appeal in forma pauperis, and it is further ordered that a stenographic copy of the minutes of the trial be furnished to defense counsel at the expense of the Government FRANKEL, J. (mailed notice)
3-2-70	Filed affdvt. of Thomas J. Fitzpatrick, Asst. U.S. Atty for w/h/c Ad Pros.
2-27-70	Filed notice of appeal to the USCA from the judgment of 2-19-70
3-6-70	DENNETH BASS—Filed Writ of H/C Ad Pros. dtd. 3-2-70 & endorsed writ satisfied FRANKEL, J.
3-26-70	DENNETH BASS—Filed appearance bond in the sum of $2,500.00 by Public Service Mutual Ins. Co., dtd. 2-10-70 before U.S. Commr. Bishopp.
4-14-70	Filed Commitment & entered return, Deft. Delivered to the Detention Hdqtrs HFO
4-21-70	Filed Transcript of record of proceedings, dated —1-14, 15 & 2-19-70
4-21-70	Filed CJA Voucher for compensation and expenses of appointed counsel. (Mailed orig. to Adm. Off. Wash. D. C.) MURPHY, J.
6-10-70	Filed order that bail bond, Amt. $2,500, is exonerated. The security posted therefor may be transferred to the appeal bond herein ordered. Order S/ Judge Frankel.

A TRUE COPY
JOHN LIVINGSTON, Clerk
By *Illegible*
Deputy Clerk

TJF:rms
55347

[filed Dec. 15, 1969]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, - v - DENNETH BASS, *Defendant.*	*INDICTMENT* 69 Cr.

The Grand Jury charges:

1. On or about the 1st day of February, 1968, DENNETH BASS, the defendant, was convicted by a court of a state of the United States, to wit, the Supreme Court of the State of New York, Bronx County, of a felony, to wit, attempted Grand Larceny in the Second Degree, in violation of §§ 1296 and 2 of the Penal Law of New York.

2. On or about the 29th day of July, 1969, in the Southern District of New York, DENNETH BASS, the defendant, having been so convicted, unlawfully, wilfully and knowingly did possess a firearm, to wit, one (1) .32 caliber Baretta automatic pistol.

(Title 18, United States Code, Appendix § 1202(a)(1).)

TJF:rrr-2
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SECOND COUNT

The Grand Jury further charges:

1. On or about the 1st day of February, 1968, DENNETH BASS, the defendant, was convicted by a court of a state of the United States, to wit, the Supreme Court of the State of New York, Bronx County, of a felony, to wit, attempted Grand Larceny in the Second Degree, in violation of §§ 1296 and 2 of the Penal Law of New York.

2. On or about the 30th day of July, 1969, in the Southern

District of New York, DENNETH BASS, the defendant, having been so convicted, unlawfully, wilfully, and knowingly did possess a firearm, to wit, one (1) Stevens 12 gauge shotgun.

(Title 18, United States Code, Appendix, § 1202(a)(1))

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THIRD COUNT

The Grand Jury further charges:

On or about the 29th day of July, 1969, in the Southern District of New York, DENNETH BASS, the defendant, unlawfully, and knowingly did carry a firearm during the commission of a felony which may be prosecuted in a court of the United States, to wit, the receipt, concealment and sale of a narcotic drug, in violation of Title 18, United States Code, §§ 173 and 174.

(Title 18, United States Code, § 924(c)(2))

/s/ *Edmond Coffy*
Foreman

/s/ *Robert M. Morgenthau*
ROBERT M. MORGENTHAU
United States Attorney

(Jury present.)

THE COURT: All right, Mr. Fitzpatrick.

MR. FITZPATRICK: Thank you, your Honor. Your Honor, I believe Mr. Kessler wants the witnesses excluded. Is that correct?

MR. KESSLER: I was about to request that, your Honor.

THE COURT: All right.

(Some people left the room.)

MR. FITZPATRICK: Your Honor, Mr. Kessler, Madam Forelady, ladies and gentlemen of the jury:

As his Honor told you before, my name is Thomas Fitzpatrick and I represent the Government in this case.

His Honor previously outlined the indictment to you, and I just want to briefly describe it once again.

Count 1 charges that the defendant had been previously convicted of a felony in a New York State Court. The offense is that having been so convicted on or about the 29th day of July 1969, the defendant possessed a firearm, namely a 32-caliber Baretta automatic pistol.

Count 2 is similar, based on the same previous conviction and this count charges that on or about the 30th day of July, the following day, the defendant, having been so convicted, possessed a firearm, in this case a Stevens 12-gauge shotgun.

And the third count charges that on or about the 29th day of July 1969 the defendant carried a firearm during the commission of a felony and may be prosecuted in a United States Court, and that felony which it is alleged he was committing while he carried the firearm was the sale of narcotics in violation of a Federal statute.

Now, my purpose here is to just briefly outline to you what the Government intends to prove in the trial. As his Honor told you, the only evidence will be the statements that are made by the witnesses on that witness stand and any documents or physical evidence that is actually received into evidence. The evidence will come in in piecemeal fashion, and I would ask you to give your close attention to it. My purpose now is to just briefly outline what that evidence will show.

The Government will introduce this evidence through various agents of the Alcohol, Tobacco & Firearms Division of the Internal Revenue Service. Special Investigator George Jordan will testify that on July 29th and on July 30th he spoke to the defendant Denneth Bass, who is seated here, and on the second occasion actually there was an actual transfer of narcotics from Mr. Bass to Mr. Jordan. On the first occasion he was directed to another area of the building where he made a purchase of narcotics. In each case it is charged that the narcotic drug was heroin.

Mr. Jordan will also testify that on the 30th day of July, while he was on the premises, he observed the defendant carrying the Baretta automatic pistol which is mentioned in the indictment.

He will also testify that on the 31st day of July 1969—excuse me—on the 30th day of July 1969 he observed on the premises of the defendant's home the 12-gauge shotgun mentioned in the indictment.

You will also hear the testimony of Special Investigator Robert Patty, who found the two weapons that are charged in this indictment on the premises of the defendant's home. He will also testify to certain admissions or statements which the defendant made. You will also hear the testimony of Special Investigator Kenneth Coniglio, who placed the defendant under arrest.

And, finally, you will hear the testimony of a Government chemist who analyzed the substance which Mr. Jordan bought from the defendant. And I believe the testimony and the evidence will show that that substance was heroin.

I would ask you to listen very carefully to all the evidence and his Honor's instructions at the end of the case, and I think you will find at that time the Government has proven its case beyond a reasonable doubt.

Thank you.

MR. KESSLER: Your Honor, at this time I will not make any statement.

THE COURT: All right.

Mr. Fitzpatrick, do you want to call your first witness.

MR. FITZPATRICK: The Government's first witness, your Honor, is George Jordan.

GEORGE JORDAN, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Jordan, how are you employed?

A. I am employed as a special investigator, United States Treasury Department, Alcohol, Tobacco & Firearms Division.

Q. How long have you been so employed?

A. Over ten years.

Q. Directing your attention to July 28th, 1969, were you working on that day?

A. Yes, I was.

Q. In what capacity?

A. I was employed in my official duties as a special investigator, United States Treasury Department.

Q. Were you working in an undercover capacity on that day?

A. Yes, I was.

Q. In what area?

A. I was in the Bronx, in the vicinity of Fairmount Place.

Q. For what purpose?

A. I had received information that——

MR. KESSLER: Your Honor, I will object to that.

THE COURT: Sustained.

Q. Did you go to any particular place on that day?

A. Yes, I did. At about——

Q. Where did you go?

A. To the premises situated at 804 Fairmount Place, Bronx.

Q. At approximately what time?

A. It was in the evening, between 6 and 6:30.

Q. What did you do at that premises?

A. I went to this premises and knocked on the door and I asked for Dennis.

At that time a man now known to me as Denneth Bass came to the door.

I told him that I needed to purchase some narcotics.

And at that time he directed me to the basement of this building which was——

Q. Did he open the door and speak to you?

A. Yes, he did; he opened the door about six inches.

Q. Could you get a good view of him?

A. No, I couldn't get a good view of him; he held his body partially behind the door so that I could only see his face and his shoulder. I couldn't see half of his body at least.

Q. Will you continue as to what happened when you went downstairs?

A. I went downstairs to the basement entrance of the building, there at the door, which was, which had an iron gate in front of it, I knocked on the door, and a person came but he stayed in the shadows. I couldn't see who he was. I couldn't make out his physical description at all.

I told him that I wanted to buy a couple of bags. I asked him the price. And he told me $2.

I told him I wouldn like three bags. He said, "Well, give me the money."

I passed the money through the iron grate.

Q. Was that $2 per bag?

A. $2 per bag.

I passed the money through the iron grate, and he shortly returned and gave me three small glassine envelopes which were secured by a type of masking tape. And I left the premises at this time.

Q. What did you do with those three glassine envelopes?

MR. KESSLER: Your Honor, I will object to any further testimony in this area, unless there is a further connection to Mr. Bass or to the crime charged in the third count which is on a different date.

MR. FITZPATRICK: Your Honor, I will withdraw the testimony on this and continue with something which may be more orderly.

THE COURT: All right.

Q. Mr. Jordan, did you return to these premises on the following day?

A. Yes, I did.

Q. That would be July 29th?

A. That is correct.

Q. Approximately what time?

A. I believe this was in the afternoon, some time around 3, 3.30, something like that.

Q. Were you again in an undercover capacity?

A. Yes, again acting in an undercover capacity.

Q. What did you do?

A. Acting in the undercover capacity I again went to the premises; this time I carried with me a portable clock radio, Panasonic, and I went to the premises.

I knocked on the door and again asked for Dennis. Again a man now known to me as Denneth Bass came to the door.

I told him I was short of money and wanted to buy some more narcotics and would he exchange the radio for some narcotics. At this point he—there was a chain on the door which held it to a certain six-inch opening. He removed the chain and opened the door and admitted me to the premises. At this time——

Q. At this time did you get a good look at this man?

A. Yes, I did.

Q. Was there any doubt in your mind as to whether he was the same man you had seen the previous day?

A. He was the same man.

MR. KESSLER: Your Honor, may we fix which man he had seen on the previous day?

Q. Was he the same individual you saw when you initially went to the door and asked for Dennis?

A. He is the same individual which I initially saw on the first day.

Q. And not the man you saw when you went down to the basement?

A. That is correct.

Q. This man who to you was known as Dennis, do you see him in the courtroom today?

A. Yes, I do.

Q. Would you point him out, please?

A. He is the man sitting at the table with counsel; he has on a white shirt, dark coat and a blue and red tie.

MR. FITZPATRICK: May the record reflect that the witness has properly identified the defendant?

THE COURT: All right.

Q. What happened after you entered the premises, Mr. Jordan?

A. After I entered the premises, I noticed that the defendant had in his right hand a small automatic pistol which I later identified to be a Baretta automatic.

At this time he told me that he had to be very careful and that I shouldn't be afraid because I saw the gun but that he had to be careful because he was afraid of robberies or words to that effect.

At this time I offered him the radio, and he plugged the radio in and checked it to see if it was operable. It played.

And I asked him how much narcotics he would let me have for it.

At which time he said that he would let me have seven bags.

I agreed to that.

He went into the back portion of the apartment and returned with the seven bags of narcotics and gave them to me. I left the premises.

Q. And what did you do with those seven bags?

A. I put those seven bags in a franked envelope that our office has, and placed them in the evidence room at 120 Church Street.

Q. That was a separate envelope from which you had placed the three bags you had bought the previous day?

A. That is correct.

Q. Did you seal those envelopes?

A. Yes, I did.

MR. FITZPATRICK: May these be marked Government's Exhibits 1 and 2 for identification.

(Government's Exhibits 1 and 2 marked for identification.)

MR. FITZPATRICK: May this be marked Government's Exhibit 3 for identification.

(Government's Exhibit 3 marked for identification.)

MR. FITZPATRICK: And Government's Exhibit 4 for identification.

(Government's Exhibit 4 marked for identification.)

Q. Mr. Jordan, directing your attention to Government's Exhibits 1 and 2 for identification, do you recognize those?

A. Yes. Government's Exhibit 1 has my handwriting on it, which states——

Q. No. Without reading it, you do recognize it?

A. Yes.

Q. Is that the envelope into which you placed the three glassine bags you bought on the 28th of July?

A. Yes, it is.

MR. KESSLER: Your Honor, I still am going to object to any testimony as to that transaction.

THE COURT: What do we need that for, Mr. Fitzpatrick?

MR. FITZPATRICK: Your Honor, the chain of custody.

THE COURT: Is anything about the 28th admissible, and if so, on what ground?

MR. FITZPATRICK: The 28th was the date of the first purchase.

THE COURT: Yes, I know. But is there any charge with respect to that in the indictment?

MR. FITZPATRICK: No, there isn't, your Honor.

THE COURT: Is there some ground on which you think you ought to receive it?

MR. FITZPATRICK: Yes, your Honor. I think if for no other reason than to prove intent, and certainly a common scheme, your Honor. It is close enough in time.

MR. KESSLER: Your Honor, I have no objection to the testimony that is already in the record concerning the discussion between this witness and the defendant. However, any further exploration of matters between the witness and persons not known to us I think should be excluded.

THE COURT: Well, I will exclude it at this time on what I think is a discretionary subject. You can renew it later if you really think you need it.

MR. FITZPATRICK: Very well, your Honor.

THE COURT: It has been adequately identified?

MR. FITZPATRICK: Yes, your Honor.

THE COURT: Mr. Kessler, I assume that if I were to change my mind there would be no problem about the chain of custody, and so on, for which we would have to recall Mr. Jordan, or do you know?

MR. KESSLER: No, your Honor, there would not be.

THE COURT: All right. I will sustain the objection as of now.

MR. FITZPATRICK: Very well.

Q. Mr. Jordan, directing your attention to Government's Exhibit 2 for identification, do you recognize that?

A. Yes, sir, I do.

Q. Is that the envelope into which I placed the seven glassine bags that you bought on the 29th of July?

A. Yes, it is.

Q. Did you seal that envelope?

A. Yes, I did.

Q. Where did you place it?

A. I placed it, together with the purchase that I had made the previous day, in the evidence room.

Q. Directing your attention only to Government's Exhibit 2 for identification, you placed that in the evidence room, is that correct?

A. Yes, I did.

Q. Was that on the same day, on July 28th?

A. This purchase was made, the day—on the 29th.

Q. Excuse me. On July 29th, 1969.

A. Yes, I did. I placed this in the evidence room that same day.

Q. Did there come a time when you retrieved that exhibit from the laboratory?

A. Yes.

Q. Do you recall the date?

A. I believe it was in August, around August 20th, I believe it was, I went to the laboratory and retrieved this from the laboratory and replaced it in the evidence room.

Q. Was it sealed in the condition that it is in now?

A. It was just like this.

Q. Where did you place it?

A. Back in the evidence room.

Q. Directing your attention to Government's Exhibit 3 for identification, do you recognize that?

A. Yes, I do. This is the radio that I used on the 29th to purchase the seven bags of narcotics. I recognize it because it has a cigarette burn on the top.

MR. FITZPATRICK: I offer this.

MR. KESSLER: I have no objection.

(Government's Exhibit 3 for identification received in evidence.)

Q. Mr. Jordan, directing your attention to Government's Exhibit 4 for identification, do you recognize that?

A. Yes, I do.

Q. Is that the weapon you saw in the possession of Mr. Bass on July 29th?

A. That is correct.

Q. How do you recognize that?

A. When the weapon was seized, Special Investigator Patty——

MR. KESSLER: Your Honor, I object to this unless it is a little more certain that these events are in the knowledge of Mr. Jordan.

THE WITNESS: Yes, I observed Special Investigator Patty place his initial on the trigger guard of the weapon.

MR. FITZPATRICK: I offer it.

MR. KESSLER: Your Honor, may I inquire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

By MR. KESSLER:

Q. Where did the investigator put his initials?

A. It's a little difficult to see. I happen to know where it is, but the lighting is not too good. It's right in there (indicating). It is scratched in. It is at the junction of the trigger guard.

Q. I see something there. Is any initial on this part?

A. No, on this part there is no initial. Just on the guard itself.

MR. KESSLER: No objection to the gun. However, to the attached part I will object.

By MR. FITZPATRICK:

Q. Mr. Jordan, was this magazine enclosed in the gun at the time?

A. It was in the gun at the time. We only removed it to make the gun safe.

MR. FITZPATRICK: I offer both pieces.

VOIR DIRE EXAMINATION

By MR. KESSLER:

Q. Was it removed in your presence?
A. Yes.
Q. And attached to the gun in your presence?
A. I attached it.

MR. KESSLER: I have no objection.
(Government's Exhibit 4 for identification received in evidence.)

By MR. FITZPATRICK:

Q. Mr. Jordan, in the course of your duties as a special investigator with the Alcohol, Tobacco & Firearms Division, were you specially trained in the handling and identification of firearms?
A. Yes; we are.
Q. Could you tell what type of firearm that is?
A. This is what we call an automatic firearm. The caliber is 32.
Q. What make is it; do you know?
A. It's a Baretta, and it is written on here, "Baretta."
Q. Thank you.
Mr. Jordan, directing your attention to July 30th, 1969, did you return to the premises on that day?
A. Yes, I did.
Q. Approximately what time?
A. This was later in the evening, I would say close to eight o'clock.
Q. What happened on that occasion?
A. At this time I was in possession of an arrest and search warrant, and I was in the company of other special investigators of the Alcohol, Tobacco & Firearms Division. I went to the premises, knocked on the door——
Q. Were You by yourself at this time?
A. At this time I was by myself, and I was again acting in an undercover capacity.

I knocked on the door, and the defendant recognized me and admitted me to the premises.

Once I was in the premises—I had with me an 8-millimeter projector with which I had planned to discuss the exchange of narcotics with the defendant.

He admitted me into the bedroom of his premises. And we were sitting on the bed talking about the projector at that particular time. At this time I noticed on a night table, situated at the head of the bed, a sawed-off shotgun.

While we were discussing the projector the other investigators knocked on the door, announced themselves as being special investigators, Federal officers, with a search warrant.

At this time the defendant said, "Be still, be quiet," and he ran into the back part of the house.

I immediately ran to the front door, opened the front door and admitted the other special investigators.

MR. FITZPATRICK: May this be marked Government's Exhibit 5 for identification.

(Government's Exhibit 5 marked for identification.)

Q. Mr. Jordan, directing your attention to Government's Exhibit 5 for identification, do you recognize that?

A. Yes, I do. I recognize it because it is a sawed-off shotgun, the butt is sawed off, the barrel is sawed off. At the time it was seized Special Investigator Patty again put his initial in the—on the trigger housing.

Q. Was that done in your presence?

A. It was done in my presence. We unloaded the weapon. There was a round in the chamber. Investigator Patty and I unloaded it.

Q. Is that the weapon you saw on the night table?

A. This is the weapon.

MR. FITZPATRICK: I offer it.

MR. KESSLER: I have no objection, your Honor.

(Government's Exhibit 5 for identification received in evidence.)

MR. FITZPATRICK: I have no further questions, your Honor.

CROSS EXAMINATION

By MR. KESSLER:

Q. Mr. Jordan—I am sorry—Special Investigator Jordan——

A. "Mister" is fine.

Q. Very good.

On the 28th you received nothing from Mr. Bass, is that not correct, the first day you went?

A. No, I only talked with him. I went down to the basement.

Q. And he gave you nothing and you gave him nothing?

A. That is correct.

Q. When you did talk to him you told him that you needed narcotics, is that correct?

A. That is correct.

Q. And on the 29th you came back and you again told him that you needed narcotics?

A. That is correct.

Q. How long have you been agent?

A. Over ten years.

Q. And have you been dealing with narcotics violations for any part of that period?

A. Not directly that much. Occasionally we do.

Q. About how often?

A. It is difficult to say. Whenever it comes up incident to an investigation.

Q. Well, do you have any knowledge of the use of narcotics through your work?

A. If you mean have I had any special training in the use of narcotics, yes, I have, because all Treasury agents are instructed at the Treasury school in Washington.

Q. These bags that you purchased, these are what we call $2 bags, is that correct?

A. They are called bags. The price varies. In Brooklyn a bag like that might cost you $3.

Q. They are bigger bags, though, aren't they? These are the smallest quantity sold, isn't that correct?

A. They have different prices for the same size bag.

Q. But this is the smallest quantity sold, is that correct, this unit called a bag?

A. Yes. The term "bag" is almost generic, and I think it is loosely termed. They have different street language, colloquial language which you might use for it. But generally speaking that would be the smallest quantity to purchase.

Q. Thank you.

Now, someone who is addicted to heroin would use quite a bit more than one of these bags at a time when he used his narcotics, is that correct?

A. I am hesitating on the word "addiction."

Q. Let me rephrase the question and be a little more specific.

Somebody who had used narcotics, specifically this narcotic, heroin, sufficiently long for his body to build up a tolerance could and perhaps would have to use as many as eight or ten of these little bags at one time to reach the desired effect?

A. That would be a little heavy. I think the average is around five or six bags a day.

Q. Five or six is about the average, you would say, as far as you know?

A. To the best of my knowledge. I might say this, too:

The potent of heroin, that is, how strong it is, would vary. If the mixture is weak, the person might require more bags per day, or if it is sufficiently strong, one dose could be an overdose.

Q. And of course, also, when I mention each time, someone who is addicted might use this quantity more than once in a day, is that correct?

A. Yes, I would agree with you.

Q. When you came to—let me withdraw that. Where is this house, where was it?

A. On Fairmount Place, in the Bronx, at 804.

Q. And what sort of a neighborhood is that?

A. I would consider it a ghetto, a depressed area; somebody else may consider it otherwise.

Q. Well, what is the area of the Bronx that it would be in? What is the neighborhood called?

A. I don't know any specific neighborhood by name.

Q. Mr. Bass told you that he had the weapons to protect himself from robberies?

A. Yes, he did.

Q. Have you ever done any investigative work in that area?

A. In that particular area?

Q. Well, yes, that neighborhood.

A. Yes, I have.

Q. Are robberies common there?

A. I would say that there is a great likelihood that they might be; I don't know of any specific robberies.

Q. Does this work, by the way, this gun?

MR. FITZPATRICK: I object, your Honor, unless the witness knows it as a fact.

MR. KESSLER: Of course.

THE COURT: If he doesn't know, he would say he doesn't know.

Overruled.

A. I honestly don't really know.

Q. Well, do you know whether any tests were performed upon this weapon?

A. The weapon was not fired with a shell. We examined it, we gave it what we call an operations test.

Q. And you did this personally?

A. In conjunction with a Customs agent that operates the range.

Q. Did it have a firing pin?

A. It has a firing pin but the firing pin may be defective.

Q. When you came to purchase narcotics on the 29th, you came with this radio, which was placed into evidence is Government's Exhibit 3?

A. That is correct.

Q. Then at that time you told Mr. Bass that you needed narcotics but didn't have money?

A. That is correct.

Q. Were you playing any particular role at this time?

A. I was continuing my undercover role.

Q. Were you attempting to appear like a typical narcotic addict who would be coming to purchase drugs?

A. No, I was not.

Q. Well, you purchased, I believe, seven bags for this radio, is that correct?

A. Right.

MR. KESSLER: May I have a moment, your Honor?
THE COURT: Yes.

Q. On the 30th you had a search warrant, is that correct?
A. That is correct.
Q. Was a search made?
A. Yes, a search was made.
Q. Was a search made for narcotics at that time?
A. No; our search was not for narcotics at the time.
Q. You mean you did not look for any narcotics?
A. No, I don't mean that. I mean that——
Q. Did you look for narcotics or didn't you?
A. In the course of searching for what we were searching for, we did keep our eyes open for narcotics. That is the best way I can answer that question.
Q. Did you find any?
A. No, we didn't find any narcotics per se.
Q. You mean you found no narcotic substance? Well, I will withdraw that.
Did you find any heroin?
A. I am debating——
Could I speak to you both before I answer that question, because I don't want to say anything prejudicial, and I don't——

MR. FITZPATRICK: May we have a side bar, your Honor?
(To the jury) I don't decide the fact, you do, so if there are any things that shouldn't come into evidence and I hear them, it won't affect me; but it might theoretically affect you, and that is why, not wishing to be discourteous, we go over into private like this.
(The following took place at side bar out of the hearing of the jury.)
MR. FITZPATRICK: Your Honor, what Mr. Jordan was going to testify to is the fact that they found narcotic apparatus on the premises, and as long as Mr.——
THE COURT: No, I think he just answer the question. If you want it, you are entitled to bring that out on redirect.
MR. FITZPATRICK: I do intend to.
MR. KESSLER: My question was——
THE COURT: I will allow it on redirect, though. I think we ought to take care of the whole business.

MR. KESSLER: As long as he just answers my question now.

THE COURT: All right.

(Side bar conference ended and the following took place in the hearing of the jury.)

THE COURT: I think the question at this time, Mr. Jordan, is strictly: Did you find any narcotics? And whatever might conceivably happen some other place or time, answer only that question yes or no.

THE WITNESS: I think the best answer, your Honor, is I don't know, and there is a reason——

THE COURT: You don't know.

THE WITNESS: Right.

THE COURT: Do you want to pursue it, Mr. Kessler?

Q. Well, did you find the plastic white powdery substance? Yes or no.

A. A small quantity, I would have to put it that way.

Q. You mean a quantity in the amount that you had purchased before, or smaller?

A. Smaller than that.

MR KESSLER: No further questions.

MR. FITZPATRICK: Just a couple, your Honor.

REDIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Jordan, did you find anything that might be classified as narcotics apparatus during your search of the premises?

A. Yes, we did.

Q. What did you find?

A. We found a strainer; we found quantities of narcotics broken down and sold to distributors, and they are sold usually in quantities and they are wrapped in finfoil. And we found the tinfoil—this is why I say I couldn't be sure—because in the tinfoil there was the powder, but it was too small to take to the lab. We found that. We found spoons and other devices that they use in cutting the narcotics and weighing it out.

MR. FITZPATRICK: Your Honor, at this time, if I may, I

would like to open Government's Exhibit 2 for identification, which is a sealed envelope.

I am opening——

THE COURT: Mr. Kessler looks——

MR. KESSLER: Yes, I didn't have anything to do with Government's Exhibit 2, as far as I know, on my cross-examination.

THE COURT: No. Is there any other objection?

MR. KESSLER: None, your Honor.

THE COURT: I will let him do it. If you want further cross, I will allow that.

MR. FITZPATRICK: Thank you, your Honor.

I am opening it by breaking the original seal on the envelope.

May these be marked Government's Exhibit 6 for identification.

(Government's Exhibit 6 marked for identification.)

Q. Mr. Jordan, directing your attention to Government's Exhibit 6 for identification, do you recognize those items?

A. Yes, sir, I do.

A. How many are there?

A. There are seven bags.

Q. Are those the bags that you received from Mr. Bass on July 29th, 1969?

A. Yes, they are.

Q. And they are the ones that you placed into Government's Exhibit 2 and then sealed, is that correct?

A. That is correct.

MR. FITZPATRICK: I have no further questions, your Honor.

RECROSS EXAMINATION

By MR. KESSLER:

Q. Mr. Jordan, in using this narcotic, if you wish to inject it, one way of doing that is to empty it into a spoon with some liquid and heat it up and then put it in a syringe, is that correct?

A. That is what I have been told.

Q. And that is what spoons are used for, and one purpose—I will withdraw that.

That is one purpose of using the spoon, is that correct?

A. That is one purpose, yes.

Q. And the narcotics, which you say at times is wrapped in tinfoil, was that it?

A. Yes.

Q. Tinfoil?

A. The same kind of tinfoil you might wrap a piece——

Q. That is the same kind of narcotics that we have here in a somewhat great economy, is that correct?

A. Yes. The best way to answer that is yes.

MR. KESSLER: Thank you.

THE COURT: Anything else from Mr. Nordan, gentlemen?

MR. FITZPATRICK: I have nothing further, your Honor.

MR. KESSLER: No, your Honor.

THE COURT: All right, Mr. Jordan.

(Witness excused.)

MR. FITZPATRICK: The Government's next witness is Robert Patty.

ROBERT PATTY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Patty, how are you employed?

A. I am a special investigator, United States Treasury Department, assigned to the Alcohol, Tobacco & Firearms Division.

Q. How long have you been so employed?

A. 15 years.

Q. Directing your attention to July 30th, 1969, were you working that day?

A. I was.

Q. Directing your attention to the evening of that day, would you tell the members of the jury what you were doing?

A. Yes. I was with several members of my squad up on—was it 804?—I can't quite remember the address; we had an arrest warrant and search warrant I believe for premises. I took part in the activities to execute a warrant.

Q. Do you know the street on which the premises were located?

A. I just can't remember the name now. I am sorry, I don't have my notes with me, Counselor. I can't remember it.

Q. Mr. Patty, would it refresh your recollection if you were told that the address was 804 Fairmount Place?

A. That is correct.

Q. Approximately what time did you go there?

A. It was in the evening, early evening.

Q. Do you remember the approximate time?

A. Some time around 6.30, in there somewhere.

Q. Did you enter the premises at 804 Fairmount Place?

A. Along with several others of the group, I did, yes.

Q. How did you obtain entrance?

A. Well, I wasn't the first one in; I was the fourth or fifth one that went in. They knocked——

Q. Were you with the group that did enter?

A. Yes, I was with the group that entered, but I wasn't right at the door.

Q. How did they obtain entrance?

A. They knocked on the door, and the door was opened, I don't know by who.

Q. What did you do when you entered the premises?

A. I walked—there was a living room that I went into and my group walked through into a bedroom, and my area supervisor told me to look around for any weapons, which I proceeded to do.

Q. Did you find any weapons?

A. Yes. Right alongside the bed, on the night table, there was a sawed-off shotgun, which I took.

Q. Directing your attention to Government's Exhibit 5 in evidence, is that the shotgun you are referring to?

A. It is.

Q. How do you recognize it?

A. I have my mark scratched in here, in the middle.

Q. Did you continue your search for weapons?

A. I did.

Q. Did you find any others?

A. Yes. Under the bathtub in the bathroom I found a Baretta.

Q. Directing your attention to Government's Exhibit 4 in evidence, is that the weapon you found under the bathtub?

A. It is; it has my mark.

Q. Was the weapon loaded at the time?

A. Yes; they both were loaded.

Q. Did you seize anything else while you were on the premises?

A. Yes. I removed a clock radio, which was plugged in in the bedroom.

Q. Directing your attention to Government's Exhibit 3 in evidence, would you tell us whether that is the radio?

A. Yes, that is the radio. It has my scratch on here.

Q. Mr. Patty, directing your attention to the following day, July 31, 1969, were you present when the defendant was interviewed by me?

A. I was.

Q. At the time of that interview was the defendant warned of his rights?

A. He was.

Q. Would you tell the members of the jury what rights specifically he was warned of?

A. He was told that he didn't have to make any statements, that he could have an attorney present, but that if he did answer any questions he could stop at any time he felt he wanted to, he could have counsel, and if he couldn't afford counsel one would be given to him.

Q. Was he told that anything he said could be used against him in a court of law?

A. That is correct, he was.

Q. After those warnings did the defendant make any statement concerning the facts of this case?

A. I recall he was asked about the——

THE COURT: Just say yes or no.

A. Yes, he did.

Q. What did he say?

A. He was asked about narcotics and——

THE COURT: Is this all acceptable, Mr. Kessler?

MR. KESSLER: Well, your Honor, I have no objection to what he said but not what he was asked.

THE COURT: Why don't you say what he said? Can you say it without saying what he was asked?

THE WITNESS: Yes. He said he knew nothing about narcotics but admitted that the two guns that I had taken in the apartment were his. He stated that he had purchased them a few weeks before from some unknown person on the street who was selling them, and that he had purchased them for his own protection; that he had been robbed, I don't recall if he said once or twice, in his apartment, and he wanted to be protected, and he bought these guns.

Q. Did he say anything else?
A. Yes. He said that he had been convicted——
Q. No.

MR. KESSLER: Sorry.
Your Honor, I move to strike that out.
THE COURT: All right.
MR. FITZPATRICK: May this be marked Government's Exhibit 7 for identification.
(Government's Exhibit 7 marked for identification.)
MR. FITZPATRICK: I offer this, your Honor.
MR. KESSLER: Your Honor, we will stipulate that Mr. Bass has been convicted of a felony.
THE COURT: Let's be more precise. What is it you are stipulating?
MR. KESSLER: That on July 20th, 1967, Mr. Bass, the defendant here, was charged with a crime, and that on January 3rd, 1968 he was—well, he pleaded guilty, and that that crime was a felony.
MR. FITZPATRICK: And it is the felony, your Honor, that is charged in the indictment in Counts 1 and 2 as a felony for which he had previously been convicted.
THE COURT: Is that correct, Mr. Kessler?
MR. KESSLER: I can't say whether it is the felony, but since it is a felony it would certainly suffice.
THE COURT: Well, is it stipulated that for our purposes the jury may consider it as being the felony?
MR. KESSLER: Yes, certainly.
THE COURT: All right. Then as I understand the stipulation there is no dispute that on or about the 1st day of February 1968 the defendant was convicted by the New

York Supreme Court, Bronx County, of the felony charged in Paragraph 1 of Count 1 and Count 2 of the indictment herein; is that right?

MR. KESSLER: That is correct.

THE COURT: Okay.

MR. FITZPATRICK: Your Honor, I believe we have cleared up any possible problem on the stipulation as to whether or not it was the same crime, is that correct?

MR. KESSLER: Okay.

MR. FITZPATRICK: I have no further questions, your Honor.

CROSS EXAMINATION

By MR. KESSLER:

Q. Mr. Patty, on the 31st was the defendant told that the purpose of his interview was to gain or to supply information which could be used by the Assistant United States Attorney in making an informed proposal as to what bails should be set when this matter appeared before the Commissioner?

A. I don't recall that specifically, Counsel.

Q. Well, was something to that effect told him?

A. Something like that.

Q. When you entered the house of Mr. Bass and you entered his bed room, in that room Government's Exhibit 3, which is the radio, was located, is that correct?

A. Was located?

Q. Yes. It was in his bedroom?

A. Yes.

Q. And it was plugged in?

A. That is correct.

Q. And where was it in the bedroom?

A. On the, when you face the bed, it was on the right wall. There was some kind of a dresser, I didn't pay too much attention, but it was standing on there.

Q. Was it on or not?

A. Was it on?

Q. Yes.

A. Not when I came in.

Q. Were there any other radios in the bedroom?

A. I didn't notice.

MR. KESSLER: I have no further questions, your Honor.

MR. FITZPATRICK: I have no further questions, your Honor.

THE COURT: All right, then, Mr. Patty. It is well timed; I think we ought to take the luncheon recess.

The cuisine in this neighborhood is not splendid and it takes time sometimes to eat, and there are a couple of small things that need to be done, so we will take a slightly extended lunch recess and plan to resume at 2.20.

(Recess to 2.20 p.m.)

AFTERNOON SESSION

(2.20 p.m.)

THE COURT: Get the jury in.

(Jury present.)

KENNETH CONIGLIO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Coniglio, how are you employed?

A. I am a special investigator with the Alcohol, Tobacco & Firearms Division of the United States Treasury Department.

Q. How long have you been so employed?

A. Approximately a year and a half.

Q. On July 30th, 1969 were you on duty?

A. Yes, sir.

Q. Were you on duty that evening?

A. That is correct.

Q. What did you do at that time; do you recall?

A. At approximately 7.55 p.m. I proceeded to the rear of a building, 804 Fairmount Place, Bronx, New York, and stationed myself in the backyard for instructions from my area supervisor.

Q. And what happened?

A. We were there pursuant to an arrest warrant. A few seconds after I stationed myself in the rear of the backyard a man now known to me as Denneth Bass exited the

rear door, at which time I announced myself as a Federal officer and placed him under arrest.

Q. Do you recognize that man in the courtroom today?

A. Yes, sir, I do.

Q. Would you point him out?

A. He is the defendant sitting at the table over there.

Q. Sitting next to his attorney?

A. Next to the attorney, yes, sir.

MR. FITZPATRICK: May the record reflect that he properly identified the defendant.

Q. When you went there did you go to effect an arrest of any particular person?

A. Yes, sir.

Q. How was that person known to you at this time?

A. Dennis.

MR. FITZPATRICK: I have no further questions, your Honor.

MR. KESSLER: I have no questions.

THE COURT: All right.

(Witness excused.)

MR. FITZPATRICK: The Government's next witness is Stephen Liebowitz.

STEPHEN LIEBOWITZ, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Liebowitz, how are you employed?

A. I am a special investigator for the United States Treasury, Alcohol, Tobacco & Firearms Division.

Q. How long have you been so employed?

A. Six months.

Q. Do you recognize the defendant Denneth Bass?

A. Yes.

Q. Would you point him out, just indicating who he is?

A. The gentleman at the back table with the red and black striped tie.

MR. FITZPATRICK: May the record reflect that the witness has identified the defendant properly.

Q. Mr. Liebowitz, were you present in my office on December 22, 1969 when I had a conversation with this defendant?

A. I was.

Q. At the time was the defendant warned of his rights?

A. Yes, he was.

MR. KESSLER: Your Honor, I will object to any statement on this day.

May we approach the bench?

THE COURT: Yes.

(The following took place at side bar out of the hearing of the jury.)

MR. KESSLER: Your Honor, this statement was elicited after Mr. Bass had been arrested, after he had been provided with counsel in July. He was rearrested in December. Counsel was not notified. I believe he had been invited. Counsel was not notified of the indictment. And there was some other inquiry. The alleged reason for this sort of inquiry by the United States Attorney is to give him information upon which he can base a request for a bail application. Certainly all the information was known to him from the first interview and going into the facts of the crime, the initial crime for which an arrest and interview had already been taken.

THE COURT: Is this after you had originally be retained?

MR. KESSLER: Yes.

THE COURT: Mr. Fitzpatrick.

MR. FITZPATRICK: Your Honor, first of all, on the question of his bail status, it was very much changed.

THE COURT: I don't care about that. You took care of the bail thing. Why should I receive the evidence?

MR. FITZPATRICK: Because at the time the defendant was fully warned of his rights, he had a right to an attorney——

THE COURT: I will receive it. It is excluded.

MR. FITZPATRICK: Very well.

(Side bar conference ended and the following took place in the hearing of the jury.)

THE COURT: For the information of the jury, I sustain the objection to this information.

MR. FITZPATRICK: I have no further questions, your Honor.

MR. KESSLER: No questions, your Honor.

THE COURT: All right, Mr. Liebowitz.

(Witness excused.)

MR. FITZPATRICK: Your Honor, the Government's next witness is Roger Canaff.

* * * * *

(Witness excused.)

MR. FITZPATRICK: The Government rests, your Honor.

THE COURT: Mr. Kessler, do you want me to give the jury a short recess at this point?

MR. KESSLER: Yes, your Honor.

THE COURT: I will do that.

We have a little legal business which will take about ten minutes.

(Jurors left the courtroom and the following took Place in their absence.)

THE COURT: Mr. Kessler.

MR. KESSLER: Your Honor, I would first move to dismiss on the ground that the Government's case is insufficient as a matter of law.

I would also move to dismiss Counts 1 and 2 on the basis that, there being no proof of any transportation of these weapons in any form in affecting or in any way around commerce, and this statute, as far as I have been able to discover, deriving from under the commerce laws, that this would be an excessive act by Congress, not within the proper scope, and that it is a matter properly to be left to the states, and that an essential element of proof of conviction would have to be some interstate element. That is as to Counts 1 and 2.

As to Count 3 I would just the motion to dismiss as to the insufficiency of the Government's case.

THE COURT: There is no allegation in the indictment of any movement in or affecting commerce; is that right, Mr. Fitzpatrick?

MR. FITZPATRICK: That is right, your Honor.

THE COURT: You don't claim that the evidence shows any such movement?

MR. FITZPATRICK: No, your Honor.

THE COURT: And am I correct in understanding that there was no motion addressed to the indictment on this ground?

MR. FITZPATRICK: That is correct, your Honor.

MR. KESSLER: There were no motions at all, your Honor.

THE COURT: Well, both motions are denied without prejudice to renewal, even if I could prejudice renewal, at least on the constitutional claim and anything else, if and when there may be a conviction.

Now are you going to put on any evidence, Mr. Kessler?

MR. KESSLER: I was going to ask for a brief recess, your Honor, perhaps five or ten minutes, to clarify that point.

THE COURT: Well, let us make it closer to five, because I think we have known where we stood. We will give you an extra minute or two if you need it. Let us know as soon as you are ready.

MR. KESSLER: Thank you, your Honor.

(Recess.)

(The following took place in open court in the absence of the jury.)

THE COURT: I was waiting to be informed. Is the defendant going to put on evidence?

MR. KESSLER: Yes, your Honor.

(Jury present.)

MR. KESSLER: Your Honor, at this time the defense calls Denneth Bass.

DENNETH BASS, the defendant, called as a witness on his own behalf, being first duly sworn, testified as follows:

MR. KESSLER: May I inquire, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

By MR. KESSLER:

Q. Mr. Bass, how old are you?

A. I am 25 years old.

Q. Mr. Bass, you have to speak up so I can hear you back here and so all the people in the jury box can hear you. Okay?

A. Yes.

Q. A little bit louder?

A. Yes.

Q. Now, where do you live?

A. I live at 829 East 167th Street in the Bronx.

Q. Do you remember in July, the 31st of July when you were arrested, do you remember that day?

A. Yes.

Q. Where did you live then?

A. I lived at 804 Fairmount Place in the Bronx.

Q. At that time, Mr. Bass, did you use narcotics?

A. Yes.

Q. Did you take them by injection?

A. No, I didn't.

Q. How would you use them?

A. Sniffing. Sniff.

Q. What did you sniff?

A. Two or three bags at a time.

Q. On the 30th, I'm sorry, on the 29th of July of 1969 did you have seven glassine envelopes?

A. Yes, I did.

Q. You did?

A. Yes.

Q. The day before that, that is the 28th, did a man who you saw testify today come to you?

A. Yes, he did.

Q. Did you have a conversation with him?

A. Yes.

Q. What did you tell him and what did he tell you?

A. He told me that he was looking for some drugs. And I told him, in other words, the person that lived in the basement, they were selling drugs. So I told him to to the basement.

Q. Were you selling drugs?

A. No. No, I wasn't.

Q. Did he have any further discussion with you at that time?

A. No, he didn't.

Q. Did you see him again the next day?

A. Yes, I did.

Q. Did you have a discussion with him then?

A. Yes, I did.

Q. Did he again tell you that he needed drugs?

A. Well, after we got into a conversation, he did.

Q. Well, speaking up, tell us what that conversation was.

A. He came: I think it was about two o'clock in the evening he came, and he had a radio with him, and he was telling me that he needed the drug. I had seven bags, this was for my own personal use, understand. But, understand, for the radio I figured that I could get the radio and then get some more for my personal use.

Q. What did you do with the radio?

A. I took the radio and tested it out, and then I put it in my bedroom.

Q. Did you use it?

A. Yes, I did.

Q. At that time did you have any discussion with the person you now know to be Mr. Jordan about robberies?

A. No, I didn't. No.

Q. Have you ever been burglarized?

A. Yes, I have.

Q. Do you remember what if anything was stolen those times—that time?

A. Well, I had been robbed a couple of times.

Q. What sort of things were stolen from you?

A. Like a TV on one occasion. Another occasion a record player. On another occasion a radio.

Q. Were you ever personally assaulted or attacked during these robberies?

A. Yes, I was.

Q. How long prior to July 30th were those robberies?

A. About a month before. And about a week afterwards, after I had, after I was released and went back home it happened again.

MR. KESSLER: May I have a moment, your Honor?

THE COURT: Yes.

Q. In the neighborhood in the Bronx where you lived on July 30th, 1969, are there many addicts?

A. Yes, there are.

Q. Did you ever see any of these addicts in withdrawal?

A. Withdrawal—clarify that.

Q. I can't hear you.

A. Clarify that for me, withdrawal.

Q. I will try to use a shorter word if I can.

Have you ever seen any of these addicts when they are not able to obtain the narcotics that they need and are still addicted?

A. Yes, I have.

Q. Would you describe how they act at those times?

MR. FITZPATRICK: I object, your Honor. There doesn't appear to be any relevance to this question at all.

MR. KESSLER: Your Honor, the testimony we have from Mr. Jordan is that he told the defendant that he needed these narcotics, and I wish to bring out exactly what this witness thought he meant by that.

MR. FITZPATRICK: He also testified that he wasn't——

THE COURT: Does it matter what he thought? I am not sure yet of the relevance of it.

MR. KESSLER: I think, your Honor, that it does matter as to the state of mind of this defendant at the time that this transaction occurred.

THE COURT: Do you have to be more specific? Do you want to come to the bench?

MR. KESSLER: Yes, your Honor.

THE COURT: (To the jury) Excuse us, please.

(The following took place at the side bar out of the hearing of the jury.)

MR. KESSLER: Your Honor, I believe that the closest I can come to describing what Mr. Bass is saying is that he believes that he was in effect seduced, though I am not trying to call it entrapment, but that he was persuaded to transfer seven bags of narcotics to the agent because he thought that the agent was sick—he didn't use the word "withdrawal," I did—and that this would, well, help him.

THE COURT: I am sorry you went through that whole interrogation. I think you should first have gotten him to describe what the agent looked like when he sold it to him.

MR. KESSLER: I will do that.

THE COURT: Is that what you are up to now?

MR. KESSLER: Yes.

THE COURT: I am very doubtful that you are going to be hurt by it, Mr. Fitzpatrick.

MR. FITZPATRICK: Very well. To avoid another side bar on cross-examination, I am going to bring out, try to bring out his conviction and what that conviction was for, and if there is going to be objection, I would like——

MR. KESSLER: There will be no objection.

MR. FITZPATRICK: Fine.

MR. KESSLER: As to what the conviction was for. We have here an arrest for a different charge. I assume Mr. Fitzpatrick is not going to go into what the charge was on the arrest.

MR. FITZPATRICK: His conviction was pleading to a lesser charge.

(Side bar conference ended and the following took Place in the hearing of the jury.)

By MR. KESSLER:

Q. Mr. Bass, would you describe to us what Mr. Jordan looked like when he came to your door on the 30th of July?

A. Well, he was, he had ordinary dress.

Q. I can't hear you.

A. He had ordinary dress, you know, sport pants and a shirt, you know, a colored shirt, and he looked like he was sick to me.

Q. That is what I would like to find out. Would you describe how he looked and what is the basis for that opinion of yours?

A. Well, to me, he looked, you know, like as if he had just, what I thought of him, well, I thought maybe he had just stole the radio from somebody or something and brought it to me and was trying to get something to get straight.

Q. I want to restate the question again. What was his face like? Did he have any mannerisms? Describe what he did or how he looked such that you thought he was sick.

A. Well, to me he was desperate. He wanted me to—in other words, he could have got more for the radio. But the way he was, he would sell for less. So that's why I thought he was desperate, like he needed it bad because he was letting it go cheap, so to speak.

Q. Now, Mr. Jordan returned on the 30th, that was the next day; is that correct?

A. That was the day of the arrest?

Q. That is right?

A. Yes.

Q. And on that day did you have any narcotics in your possession?

A. No, I didn't. No, I didn't have none.

MR. KESSLER: I have no further questions, your Honor.

CROSS EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Bass, when Mr. Jordan came to your door on July 29th with this radio, you said that he looked sick, and your attorney asked you to describe just how he looked sick, and you said, well, he looked as if he had just stolen this radio and he looked desperate.

Was there anything about his physical mannerisms that suggested to you he was sick or desperate?

A. It was mostly his conversation is what convinced me.

Q. It was mostly his conversation that suggested to you he was sick?

A. Yes.

Q. Did his eyes look strange at all?

A. It's hard to tell when a person is sick, it's hard to tell, because he looks pretty normal like any other person.

Q. Then he looked normal?

A. Unless he is sick to the point that he can't walk, or something like that.

Q. So there was nothing special about him that made him look sick to you?

A. Well, to me, he just had the look of a person that used the drugs and the habit, you know, the drug was wearing down and they was trying, they need to get a fix.

Q. Did his eyes look strange at all?

A. Well, they looked like of watery.

Q. Was he nodding or weaving in any way?

A. Well, he was sick. No, he didn't. When a person is sick——

Q. Pardon?

A. (Continuing)—they don't be nodding.

Q. When they are sick they don't nod?

A. No. The nod is after they got the drug and they are high then and then they be nodding.

Q. You saw Mr. Jordan in court today, did you not?

A. Yes, I did.

Q. And he looked fairly healthy, a fairly chunky individual, you might say, would you not?

A. Yes.

Q. Is that approximately what he looked like last July 29th and 28th when you met him?

A. Prior to the time that he made the arrest he didn't look as if he used the drug or anything.

Q. But the following day he did?

A. Yes; you know, he came in, he was, you know, like he was tired, you know, he was tired, you know, but not when he came in for the arrest. Then his appearance altogether changed, like he was wide awake, alert.

Q. And you suggesting then that you sold him your own personal supply because you felt sorry for him in this situation?

A. Yes; and also because of the radio.

Q. How many bags did you have in your home that day?

A. I had about nine.

Q. And you gave him seven for the radio, is that right?

A. Yes.

Q. Did you buy the drug from the people downstairs?

A. Yes, I did.

Q. But you never sold any other than this one occasion?

A. No, I didn't.

Q. But you were aware that they were selling it downstairs?

A. Yes, I was.

Q. Had people come to you before and asked whether drugs were being sold on the premises?

A. On a couple of occasions. If they got like—they knew the building, but they—the right door, like they didn't know whether it was upstairs or downstairs. If they knew the building. Sometimes they got mixed up and they would come upstairs and I would tell them it wasn't here, something like that.

Could I state something else?

Q. Certainly.

A. Like this selling that was going on from the basement, like, it brought a lot of people that were trying, you know, to get in the house, you know, trying to get down to rob, you know, rob, you know, take the people off for their drug that they were selling, so this constituted a threat to me, so I got me some protection to protect myself and my wife, as far as this was going on.

Q. You owned that building, is that right?

A. Yes, I did.

Q. And there were tenants?

A. Yes.

Q. I ask you to take a look at Government's Exhibit 4 and Government's Exhibit 5. Do you recognize them?

A. Yes, I do.

Q. Are they your weapons?

A. Yes.

Q. Mr. Patty testified that he found this in your bedroom on the evening of the 30th; is that correct?

A. Yes.

Q. Is that where it was?

A. Yes.

Q. And he found this under a bathtub in the bathroom; is that where you stored that?

A. Yes.

Q. When Mr. Jordan came to the door on the 29th with the radio, did you have that pistol in your possession?

A. Yes.

Q. When you were initially arrested on July 31, 1969, do you recall saying that you never carried those guns, when you answered the door?

A. Yes, I did.

Q. And that answer then was not true, is that right?

A. Yes.

Q. Do you also recall telling me that you never sold narcotics?

A. Yes.

Q. And is that answer untrue?

A. Well, I made the sale on this occasion, so that was not true.

Q. That's the only occasion you have ever sold narcotics, is that right?

A. Yes.

Q. I ask you to look at Government's Exhibit 6, the seven glassine envelopes. Do you recognize them?

A. Yes, I do.

Q. Are those the glassine envelopes that you sold to Mr. Jordan?

A. Yes.

Q. You heard Mr. Jordan testify that he found certain apparatus in your apartment, strainers and spoons and tinfoil packages with white powder; is that correct?

A. Yes.

Q. And is that true, was that apparatus in your apartment?

A. Well, the strainer could be used in the kitchen, measuring spoons could be used in the kitchen.

Q. Were these items used in the kitchen or were they used to dilute heroin?

A. They were used for the kitchen, you know, in the kitchen, for preparing food.

Q. In this particular case then they were not used in preparing heroin in any way, is that correct?

A. No.

Q. What were the tinfoil packages with white powder in them, what were they?

A. It was bonnita.

Q. What is that?

A. That is a cutting element used in preparing drugs.

Q. What were you doing with that?

A. It can also be used as a——

Q. I am not asking what it could be used for. I am asking what you were using it for?

A. Well, I wasn't using it. I was just holding it, I was just holding it for someone.

Q. For whom? The people downstairs?

A. Yes.

Q. Why were you holding it?

A. Well, to me, the bonnita it was no drug or anything, so I didn't see that I could get into trouble with it. In

other words, the drug itself is what constitute trouble. But the cut was just minor things that go along with it.

Q. Why would you want it? What reason would there be for you to have this bonnita in your apartment?

A. I was just holding on to it.

Q. Why?

A. Well, I had a sniffing habit, so by holding on to this they would, you know, give me a few bags every now and then. So I held on to it.

Q. You mean you were holding it as ransom, so to speak, to make sure they kept giving you two bags whenever you needed it?

A. No, it was theirs.

Q. You agreed to hold on to it?

A. Yes.

Q. Once again I ask you for what reason, why didn't they just keep it downstairs in their own apartment?

A. This I don't know.

Q. They just asked you to keep these envelopes up there, is that right?

A. Yes.

Q. But the strainers and the spoons, they did not belong to the people downstairs, is that right?

A. No.

Q. You used them in your kitchen?

A. They belong to me.

MR. FITZPATRICK: I have no further questions, your Honor.

REDIRECT EXAMINATION

By MR. KESSLER:

Q. Mr. Bass, are we talking about one strainer or a lot of strainers?

A. One strainer.

Q. When we talk about measuring spoons, how many of them are we talking about?

A. One set, which consists of about four spoons.

Q. You mean the kind you buy in Woolworth's?

A. Yes, on a ring.

Q. Are you married, Mr. Bass?

A. Yes, I am.

Q. Mr. Bass, you were asked whether people often came to your door asking where they could buy heroin.

A. Well——

Q. I haven't asked the question yet. Hold on.

Now in that neighborhood where you lived in July, how many people do you know there who use drugs?

A. Personally?

Q. Personally. Not limited to those who are addicted to it, but those who use it.

A. Just the people downstairs.

Q. No, not who sold it. Who used it?

A. I don't know any personally.

Q. Well, you use narcotics, don't you?

A. I have never, like, hung out with the crowd that did. In other words, this was something I was just starting.

MR. KESSLER: I have no further questions.

MR. FITZPATRICK: Just one, your Honor.

RECROSS EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Bass, you had previously been convicted of a crime, is that right?

A. Yes, sir.

MR. FITZPATRICK: I have no further questions, your Honor.

THE COURT: Anything else, Mr. Kessler?

MR. KESSLER: Nothing, your Honor. The defense rests.

THE COURT: All right, Mr. Bass.

(The witness left the stand.)

THE COURT: Did you say the defense rests?

MR. KESSLER: That is correct, your Honor.

THE COURT: Will you have anything else at this time, Mr. Fitzpatrick?

MR. FITZPATRICK: No, your Honor.

* * * * *

CHARGE OF THE COURT

THE COURT: Miss White, ladies and gentlemen of the jury:

This has been a brief trial. You have heard the evidence.

You have heard the able arguments of these young lawyers urging their opposed views for their clients as to what they think you the jury should find from the evidence.

As we have all told you, it is my task now to instruct you on the law, the law as it comes to me from the authority of Congress and higher courts, not law that I create or select for myself. It is my duty to give you the law as it is entrusted to me to convey to you, and of course it is your duty as jurors to follow those instructions. None of us is entitled here, if this procedure is to be effective and to do justice, to follow his own private views on the rules of law we enforce in our criminal proceedings.

Your critical task now, applying the few rules about which I will tell you, is to seek to determine the truth and a verdict based upon your judgment as to the truth.

You are the sole judges of the facts. We have told you before that the things said by counsel and the things said by the judge are not evidence. The evidence is the testimony you have heard and the exhibits we have received, and those are the materials from which you are to determine the truth, if you can.

I remind you, too, although I think it is unnecessary, that discussion between Court and counsel, rulings by the Court, none of those things are evidence, none of them should divert you from your attention to the evidence and the inferences you find you should draw from it.

You know now, as you probably did before, that the charge in this case, as in most criminal cases, is laid in an indictment. There are three charges in that indictment, as you know, and in a minute or two I will read the indictment to you. But let me stress once more that the indictment is no more than an accusation. Let me remind you that it is not in itself evidence of any kind. It is no indication of guilt. It is merely a statement of the charges for the guidance of the defendant and the jury in the course of this criminal trial.

The defendant has responded to that indictment by pleading not guilty. That places on the Government the burden of proving his guilt, if he is to be found guilty, beyond a reasonable doubt. It is a burden that never shifts; it remains with the Government throughout the trial.

The question whether that burden has been met, the ultimate question for you, does not depend on the number of witnesses or the quantity of testimony but on the nature and the quality of that testimony and all the evidence in your good collective judgment.

I have told you that as a corollary of the Government's burden of proof beyond a reasonable doubt it is the law with us that a defendant is presumed to be innocent of charges stated against him. That presumption stays with him throughout and would be in his service when you go to the jury room to deliberate. The presumption alone is sufficient to acquit unless you, the jury, are unanimously persuaded by the evidence beyond a reasonable doubt of his guilt.

Now because the notion of proof beyond a reasonable doubt is essential with us, it is necessary to attempt some definition of that concept. When we speak in our law of a reasonable doubt we mean what the words attempt to indicate. We mean a doubt founded on reason and arising from the evidence or lack of evidence in the case. It is the kind of doubt that a reasonable person might have after carefully weighing all the evidence. It is a doubt which has substance and is not merely shadowy. A reasonable doubt is one that appeals to your reason, to your judgment, to your common sense and experience. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy. A reasonable doubt is such a doubt as would cause prudent people to hesitate before acting in the serious affairs of their own lives. To put that a little differently, if you are confronted or were confronted with an important decision and after reviewing carefully all the pertinent factors you were beset by doubt and uncertainty and were unsure of your judgment, then you would have what we try to define as a reasonable doubt.

Conversely, taking into account all the elements that might apply to some serious problem, if you had no uncertainty and no reservation about your judgment, then, in the sense we use these words, we would say you had no reasonable doubt.

Now proof beyond a reasonable doubt does not mean proof to a certainty or proof beyond all possible doubt.

If that were the rule, few people could ever be found guilty. It is practically impossible for a person to be absolutely and completely convinced of any disputed fact which is not susceptible of mathematical and absolute demonstration. So that kind of absolute certainty is not the test by the standard of reasonable doubt.

On the other hand, I trust you will realize from what I have said on this subject that the prosecution's burden of proof in this and any other criminal case is very high and that you may convict only if your mind is free of any such uncertainty or reservation as I have tried to describe to you in defining this conception.

Now against the background of these general principles that apply to any criminal case with us I want to turn to the indictment in which the charges that you are to consider are made, and I think the simplest thing, since it is not lengthy, is to read it to you.

The first count charges as follows, and I quote:

> "1. On or about the 1st day of February 1968 Denneth Bass, the defendant, was convicted by a Court of a State of the United States, to wit, the Supreme Court of the State of New York, Bronx County, of a felony, to wit, attempted grand larceny in the second degree, in violation,"

and I end the quote there, of certain identified statutes of the State of New York.

Resuming the quote, Paragraph 2 says:

> "On or about the 29th day of July 1969, in the Southern District of New York, Denneth Bass, the defendant, having been so convicted, unlawfully, wilfully and knowingly did possess a firearm, to wit, one 32-caliber Baretta automatic pistol."

End of quote of Count 1.

Now the second count is substantially similar. The first paragraph again charges the New York felony committed in February 1968.

The second paragraph, this time referring to July 30, the day after the preceding count, charges that having been convicted of the New York felony the defendant unlawfully, wilfully and knowingly did possess another firearm, to wit, a Stevens 12-gauge shotgun.

I come to Count 3, and I quote that:

> "On or about the 29th day of July 1969, in the Southern District of New York, Denneth Bass, the defendant, unlawfully, wilfully and knowingly did carry a firearm during the commission of a felony which may be prosecuted in a court of the United States, to wit, the receipt, concealment and sale of a narcotic drug, in violation of,"

and I again end the quote and tell you that there are some cited Federal statutes of which it is alleged this receipt, concealment or sale of a narcotic drug was a violation.

Now, those are not complex charges, but to guide, and if I may say, govern your deliberations, I will now break those three counts down into what lawyers and judges, and perhaps even ordinary people, would call the elements of these offenses and undertake to define for you some of the things that may need defining.

As I have told you, the first two counts, which charge successive violations on July 29th and 30, 1969, are under a statute which says that a person who has been convicted of a State felony and who thereafter possesses any firearm is guilty of a Federal offense.

Accordingly, in order to convict under either or both of those counts you must be convicted beyond a reasonable doubt that the evidence establishes two facts or elements:

1. That on or about the 1st of February 1968 the defendant had been convicted by the Supreme Court of the State of New York of a felony; and

2. That on the day in question, in July 1969, having been so convicted, the defendant unlawfully, wilfully and knowingly possessed a firearm, namely, on July 29th, the alleged 32-caliber Baretta automatic pistol involved in Count 1. And, with respect to July 30th, the Stevens 12-gauge shotgun.

As to the first of these elements, the New York felony alleged to have been committed in February of 1968, you will recall that the parties have stipulated, have agreed, that that element is established, and you may so consider it for your purposes.

And that brings you to the second element, which is not complex, but I tell you one or two things about that:

First, the term "firearm" in the statute, which underlies this charge, or these charges, is defined as follows:

> "Any weapon which will or is designed to or may readily be converted to, to expel a projectile by the action of an explosive. This term shall include any handgun, rifle or shotgun."

And I end the quotation there.

Further amplifying the first two counts, and as I will mention, this applies to the third as well, I remind you that the defendant is charged in each of them with having behaved wilfully and knowingly in committing the allegedly wrong things of which he is accused. Now, those words, "wilfully and knowingly," go to the critical factor of criminal intent. While their meaning is not especially complicated or mysterious, this factor of criminal intent is essential and the words require some brief definition.

We say that an act is done knowingly, in the sense that concerns us, if it is done voluntarily and purposely and not because of mistake or accident or negligence or some other innocent reason.

We say that an act is done wilfully if it is done knowingly and deliberately. The requirement of wilfulness does not mean that a defendant must have known that he was violating some particular statute or must have known the terms of the statute he is charged with having violated. It does mean that he must have acted with a bad or evil purpose to disobey or simply to disregard the criminal law.

I am sure you realize that this subject of knowledge and intent, while it is a factual subject, is one on which we normally do not have direct testimony. It is rarely possible to prove directly the operation of a person's mind, unless he tells them to us, and then you have a question of whether you believe what he tells you. But the normal procedure or means by which this question of intent is determined is on the basis of inferences from the circumstantial evidence. You may judge a defendant's intent or indeed anyone's intent, and here you may judge whether the defendant acted knowingly and wilfully, by considering all the evidence you have received concerning his conduct, his statements and all the surrounding circumstances at the time and in the place of the events in question. In the end, of course,

having made this kind of determination, you may not convict unless you are convinced beyond a reasonable doubt that the necessary intent, as I have tried to define it, has been established.

I return to the third count and the somewhat more elaborate elements of which it is comprised. This, you recall, is the charge that the defendant possessed a firearm during the commission of a Federal felony, here involving narcotics. This charge can be defined initially again in terms of two general elements, and then, to complicate it a bit, but ultimately to simplify it, each of these elements may be broken down somewhat, and I will undertake to do that for you reasonably briefly.

The first element of this third count is that on the date in question, July 29th, 1969, the defendant was unlawfully carrying a firearm. Now, for purposes of this third count, the word "firearm" has a definition that is substantially similar to the one I gave you before, but it is under a different statute and the word is slightly different. I quote:

" 'Firearm' in this statute means," and here I begin the quote:

> "Any weapon which will, or is designed to, or may readily be converted to expel a projectile by the action of an explosive."

End quote.

And the definition simply ends there under this statute.

The second and more complex element in this third count is that the firearm must be proved to have been carried during the commission of the Federal felony described in this count, namely, the felony of either receiving or concealing or selling a narcotic drug. And I told you this element, in turn, requires some analysis. It may be defined in terms of the three elements of that narcotics offense.

First, that on the date in question, July 29, 1969, the defendant either received or concealed or sold a narcotic drug.

Second, that the substance or one of the substances in the packet or packets, which had been marked Government's Exhibit 6, I believe, in evidence, is in fact a narcotic drug.

Third, that the defendant at the time knew that this

narcotic drug had been unlawfully imported into the United States.

Now as to the first of these elements, receiving or concealing or selling, I have stated those disjunctively, separating the different things by the conjunction "or," and indicated to you that the Government must prove either receiving or concealing or selling of a narcotic drug.

You may recall that the indictment, following the rules for the drafting of indictments, alleges these things conjunctively. It says that he received and concealed and sold the narcotics. I instruct you now that under the law any one of those three things is sufficient to establish this first element, receiving or concealing or selling, provided of course that it is proved, as everything must be that is essential to the offense, to your satisfatcion beyond a reasonable doubt.

I instruct you next in connection with this third count that heroin, as a matter of the law that governs all of us, is a narcotic drug. So if you find that heroin was the substance in the packets in Exhibit 6, this aspect of the offense is established.

I come then to the requirement that it be established that the defendant knew this heroin had been illegally imported into the United States. You undoubtedly recall that in this brief trial there has been no evidence bearing directly on that subject of illegal importation. I tell you now that under the applicable Federal law, however, if you find that the defendant had possession of the narcotics, and that substance was heroin, and if the evidence in the case does not provide a satisfactory explanation of that possession of some other kind, then you are permitted under the law to draw two inferences:

First, that this heroin had been imported illegally and, second, that the defendant knew it had been imported illegally into the United States.

Now I tell you that these inferences are ones that you are permitted to draw, and I mean exactly that, you are permitted but not required to draw these inferences.

The fact that inferences of this kind are authorized by the law is not meant to change the fundamental rule, about which I have talked so much, requiring proof beyond a

reasonable doubt. And it does not impose on a defendant the burden of producing proof that the narcotic drug was not unlawfully imported or the burden of producing any other evidence.

So when I speak of inferences that you may draw, should you find the unlawful possession, I mean only as I have stated, that such inferences are allowable where all the evidence does not supply an explanation satisfactory to you of the possession of the narcotic. You are to consider these permissible inferences in the light of all the evidence which has been offered in arriving at your conclusion, and keep in mind here and throughout the requirement of proof beyond a reasonable doubt.

Finally, I remind you that the third count charges behavior engaged in wilfully and knowingly, as to the first two counts. I remind you of the definition I gave you earlier, and I state to you again that that definition and this essential factor of criminal intent are applicable here with respect to the third count once again.

Now, moving on to some general thoughts that are intended to assist and guide your deliberations, I mention what must be an obvious subject in almost any criminal trial, the subject of credibility. You will recall that there are some conflicts in the evidence you have heard, conflicts between some of the things said by the Government's agents and some of the things reported by the defendant, who took the stand in his own behalf. You will understand that is a central and critical part of your function, and the function of most juries, to appraise the witnesses and determine the extent to which their testimony should be thought reliable for purposes of your task in arriving at the truth. There is nothing technical or legalistic about this problem of credibility, even though it is a standard subject in a judge's charge to a jury. Jurors come to the courtroom, under our system, reflecting our basic premise that people like yourselves will make the serious decisions, exercising the everyday common sense and your collective wisdom as you would in handling your own serious affairs.

You have heard the witnesses and you have watched while they gave their brief testimony. You will undoubtedly be asking yourselves now, as you review the testimony, how

each witness impressed you. Did he appear to be truthful and frank, candid, forthright, or did he seem evasive or shifty? Did he appear to know what he was talking about? And if he did, did he appear to have a purpose to report to you truthfully what he knew? Was he consistent or self-contradictory? How in general did his manner and the matter of his testimony on direct compare with the cross-examination? You will want to consider not only the intrinsic persuasiveness of each witness' testimony but the setting of that testimony in the whole case and the impact on your judgment of any contradictory testimony that you heard from any other witness.

Now, a witness may be impeached or discredited by contradictory evidence or by evidence that at times other than his appearance on the witness stand he made inconsistent statements, or by evidence that a witness has been convicted in the past of a felony. You have heard in this case of a prior conviction of the defendant—it relates to Counts 1 and 2 but in an undisputed fashion because that element of those counts you will recall has been stipulated. For the rest, you are permitted to consider that prior conviction as it may or may not in your judgment affect the defendant's credibility. It has no other significance for our purposes in this case.

If you believe that a witness has been discredited to any degree then you have the exclusive judgment as to what weight, if any, you will give to the testimony of that witness. If you find that any witness has deliberately lied about some material subject, that may lead you to disregard all his testimony or you may accept such portions of it as your good judgment leads you to accept.

I told you earlier, and it bears repetition, that no witness in our court is entitled to any special favor and no witness' testimony is entitled to any special weight because of the party who called him to the stand or because of his status or his employment. Specifically, the mere fact that a witness may be called by the Government or be employed by the Government does not in itself entitle the testimony of that witness to more weight than the testimony of any other witness. And that, as I am sure you realize and I trust appreciate, is simply a reflection of our basic principle that

everybody in our court is equal, at least at the outset, to everybody else.

Now all of us, I think, when we consider the criminal law, even briefly, think of the question of punishment. I must instruct you, however, again, as part of the division of our responsibilities, that this problem of punishment, if you should find the defendant guilty on any count, is a matter of exclusively for the Court, for me, just as the question of reaching a verdict on the facts is a matter exclusively for you. So the question of punishment or speculations about possible punishment is a matter that ought not to enter in any way into your deliberations.

Now when, in a very few minutes, you will go to the jury room, ladies and gentlemen, it is expected that you will have in mind that each member of the jury is entitled to his or her own opinion and is expected to express that opinion for the guidance and edification of his fellows. At the same time, and as part of that procedure obviously, it is expected that you will attend to the opinions of your fellow jurors. And this obviously is the essence of this kind of collective deliberation, the expectation that you will discuss and consider the evidence together and exchange arguments and views with your fellow jurors. It means that you present your own point of view and listen to others.

If after discussion with your fellow jurors you find that some view you initially held is erroneous, then you must not hesitate to change it in all good conscience. However, while you are expected fairly to consider all points of view that you hear in discussion, you are not expected to yield your own conscientious view simply because you may be outnumbered or outvoted or outshouted. Your vote should be determined in the end by what you are convinced in conscience is the correct way to decide the facts under the instructions I have given you.

I think you must know that in order to return a verdict you must be unanimous. I remind you, too, that there are separate counts or charges in this indictment and your verdict must address itself separately to each one of them and report a decision on each one.

As to the mechanics of your deliberations together, if you find that you are uncertain and need any of the testi-

mony you have heard repeated, send us a note and we will undertake to locate it in the stenographer's record and have it repeated to you.

If you find that you have need of any of the exhibits, send us a note about that and we will undertake to make them available to you.

If you discover that anything I have said in these instructions needs clarification or repetition, send a note about that and I will undertake to supply whatever it is you need of that nature.

Now, for what I trust will be the last time, I have to consult briefly with my lawyers, and I ask you to wait while I do that, to see if there is anything further.

Gentlemen, do you want to join me?

(The following took place at the side bar out of the hearing of the jury.)

THE COURT: Exceptions?

MR. FITZPATRICK: The only thing, maybe it was covered, I don't remember it, on the third count, whether or not selling the narcotics is a felony, the indictment reads that he carried a gun during the commission of a felony. Were they actually instructed that the sale of narcotics, if they found it was done, was a felony?

THE COURT: I gave them the elements. I told them what they do have to find.

MR. FITZPATRICK: They have to find he was committing a felony.

THE COURT: No; under my instructions they just have to find the elements as I gave them to them, unless Mr. Kessler wants to insist that I add the felony thing.

MR. KESSLER: No.

MR. FITZPATRICK: All right.

MR. KESSLER: No exceptions.

THE COURT: Anything else?

MR. KESSLER: No, your Honor.

* * * * *

(Jury returned to the courtroom at 6:30 p.m.)

THE CLERK: Members of the jury, please answer as your name is called.

(Clerk calls names of jurors and they answer to their presence.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes, we have.

THE CLERK: How say you find the defendant Denneth Bass as charged in Count 1?

THE FORELADY: Guilty.

THE CLERK: And Count 2?

THE FORELADY: Guilty.

THE CLERK: And Count 3?

THE FORELADY: Not guilty.

THE CLERK: Members of the jury, listen to your verdict as it now stands recorded:

You say you find the defendant Denneth Bass guilty on Count 1, guilty on Count 2, not guilty on Count 3, and so say you all.

THE COURT: Do you wish the jury polled, Mr. Kessler?

MR. KESSLER: No, your Honor.

* * * * *

THE COURT: I think that is fair enough and I will not take into account any indications that this man is a seller of narcotics in the imposition of sentence.

Mr. Bass, you have a right at this time to make a statement and I will hear anything that you want to say that might affect your sentence.

THE DEFENDANT: I don't have anything to say at this time.

THE COURT: When did you get out on bail, Mr. Bass?

THE DEFENDANT: I think it was about four or five days ago, about a week ago.

THE COURT: Now, I think that on the two charges on which you have been convicted, Mr. Bass, this Court has to consider this subject in connection with your State situation. As I understand it from this probation report, in 1967 you were sentenced for robbery, grand larceny and assault and possession of a weapon, and the sentence was suspended, but the report says you got one and one-quarter to two and a half years for that and you were put on probation.

Is that correct?

THE DEFENDANT: Yes.

THE COURT: And it also indicates that you are scheduled

to be heard next week, February 25 on the State probation violation that arises, I guess, out of the crimes you are charged with here; is that right?

THE DEFENDANT: I have no knowledge of this. I don't know of this.

THE COURT: Do you have any knowledge of this, Mr. Kessler?

MR. KESSLER: No, your Honor. Isn't there a violation pending? I think, your Honor, what Mr. Bass means is he was unaware of any date that had been set, he is aware that specifications of violation are set, but not aware of any date for hearing.

THE COURT: I won't take into account the narcotics thing, but I will, because I think I should, take into account the State probation setup and I am going to impose a sentence on this defendant on each of the two counts on which he was found guilty of 15 months, those sentences to run concurrently.

I don't know what the State authorities will do, but it is my judgment that the defendant ought to serve the term imposed under this Court's judgment as approximately the total for both the State and Federal claims against him.

Now, I mention that on the record, it doesn't have to be part of our judgment, for your guidance, Mr. Kessler, and yours, Mr. Bass, in this sense;

If the State imposes any prison sentence for the violation of probation, you are invited, Mr. Kessler, to file a motion with me for reconsideration or reduction, it being the intention of this Court that the 15 months should represent the total, so if there is any State sentence, you use your good judgment and you can either ask to have our judgment amended to contain a recommendation that the Federal sentence be served in the State Court, if that seems pertinent, or perhaps for a suitable reduction in the Federal sentence so that the total will be the total that I have indicated in my judgment ought to be imposed .

Now, I don't know to what extent you will have the power to regulate this and to what extent the State parole authorities may wish to take into account what I have said here, but I leave it to you to handle it on behalf of this defendant.

MR. KESSLER: I will make what you said known here to them.

UNITED STATES OF AMERICA

v.

DENNETH BASS, DEFENDANT

No. 68 CR. 881

UNITED STATES DISTRICT COURT, S.D. NEW YORK.
FEB. 19, 1970.

Robt. M. Morgenthau, U.S. Atty., for the Southern District of New York, Thomas J. Fitzpatrick, Asst. U.S. Atty., of counsel for the Government.

Lawrence Kessler, New York City, for defendant.

MEMORANDUM

FRANKEL, District Judge.

Defendant has been found guilty by a jury under two counts of an indictment charging that on two specified occasions, having been previously convicted of a state felony, he possessed a firearm, thus violating 18 U.S.C. App. § 1202(a)(1). That statute says in pertinent part:

> "Any person who * * * has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

It was stipulated that defendant had been convicted in the Supreme Court of New York, Bronx County, on or about February 1, 1968, of attempted grand larceny in the second degree, a felony. Thereafter, it was provided, on July 29 and July 30, 1969, he had in his possession a firearm, a pistol and then a shotgun, respectively.

There was no allegation in the indictment and no attempt by the prosecution to show that the possession of the firearm on either occasion transpired "in commerce or affecting commerce * * *." The absence of this element, defendant now urges, vitiates the conviction. Contending that the statute was intended to reach possession of firearms by convicted felons only if such possession was shown in

fact to be "in commerce or affecting commerce," he moves for an order in arrest of judgment or for a judgment of acquittal.

For reasons which follow, the court holds erroneous the statutory construction upon which the motion is predicated.

To begin with, there is some modest, if by no means decisive, force in the government's grammatical analysis of the statutory text. The words "in commerce or affecting commerce" follow "transports," not "possesses," and there are words of approval in the books for the canon that such qualifying phrases, especially where the commas are arrayed like those here in question, should be deemed to relate only to the last antecedent. See F. T. C. v. Mandel Brothers, 359 U.S. 385, 389–390, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); T. I. McCormack Trucking Co. v. United States, 298 F. Supp. 39, 41 (D.N.J.1969); 2 Sutherland, Statutory Construction § 4921 (3rd ed. 1953). As is often the case, however, see K. Llewellyn, The Common Law Tradition 522–28 (1960), there is a contradictory canon in defendant's arsenal: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." Porto Rico Ry. Light & Power Co. v. Mor, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920); United States v. Standard Brewery, 251 U.S. 210, 218, 40 S.Ct. 139, 64 L.Ed. 229 (1920); Buscaglia v. Bowie, 139 F.2d 294, 296 (1st Cir. 1943); 2 Sutherland, loc. cit. *supra*.

Here, as elsewhere, then, the battle of canons and commas leaves us to seek for clues more promising to the legislative meaning.

The more substantial indicia in the statutory language and the pertinent, if somewhat sketchy, items of legislative history serve in total effect to refute defendant's argument. When the statute before us was enacted, the Congress and its constituencies were deeply disturbed by a recent history of horrible assassinations. At the same time the economic and human costs of individual and "organized" lawlessness were subjects of highly vocal concern. In that setting, the legislative findings are promptly intel-

ligible and apposite here. The statute reported, *inter alia*, these centrally significant judgments of legislative fact:

> "* * * that the receipt, possession, or transportation of a firearm by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce, [and]
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States * * *."

Both of the evils thus identified could be mitigated, and were intended to be mitigated, by forbidding possession of firearms to the specified classes of specially risky people, regardless of whether the possession itself occurred "in commerce or affecting commerce * * *." As was said by Senator Russell Long, sponsor of the amendment which became Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, 82 Stat. 197:[1]

"* * * Congress simply finds that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.

"You cannot do business in an area, and you certainly cannot do as much of its and do it as well as you like, if in

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[1] Sections 1201 and 1202 of Title 18 U.S.C. App. were enacted as Title VII of the Omnibus Crime Control and Safe Streets Act. The bill which (after thorough transformation) became that Act, H.R. 5037, 90th Cong., 1st Sess., started its legislative career as a measure designed to aid state and local governments in law enforcement by financial and administrative assistance. See H.R. Rep. No. 488 90th Cong., 1st Sess. (July 17, 1967). This bill passed the House August 8, 1967, and went to the Senate. A similar bill was introduced in the Senate (S. 917) and went to the Committee on the Judiciary, which rewrote it completely. See S. Rep. No. 1097, 90th Cong., 2d Sess. (April 29, 1968). The amendments included much debated provisions regarding the admissibility of confessions, wiretapping and state firearms control.

On May 17, 1968, Senator Long introduced on the floor his amendment to S. 917, which he designated Title VII. His introductory remarks set forth the purpose of the amendment. 114 Cong. Rec. 13,867–69. About a week later he explained once again the proposed effect of the addition. There was brief debate; the reaction appeared favorable but cautious. Unexpectedly, however, there was a call for a vote, and Title VII passed without amendment or extended discussion. See 114 Cong. Rec. 14,772–75 (1968).

order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce." 114 Cong. Rec. 13,869 (1968).

Similarly, the recent deaths by gunshot of a President, a presidential candidate and a national civil rights leader gave tragic testimony that disturbed people carrying weapons did not have to cross state lines to pose grave threats with which the national government had occasion (and power) to cope.[2] See, e.g., 114 Cong. Rec. 13,868–13,871, 14,772–14,775 (1968) (Sen. Long); 114 Cong. Rec. 16,297 (1968) (Cong. Pollock).

> The same day the Senate agreed to strike out the language of H.R. 5037 and substitute the text of S. 917 as amended. Following this, the new H.R. 5037 was passed by the Senate. The House passed it then on June 6, 1968, 114 Cong. Rec. 16,271–300, and it was signed by the President on June 19, 1968.

There is no need at this date in our history to document at length the power of Congress to reach intrastate occurrences which, in their voluminous and cumulative impact, may or do threaten the course of interstate commerce. See Heart of Atlanta Motel v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); Katzenbach v. McClung,

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[2] Senator Russell Long:

"* * * we clearly have a right to protect the life of the President of the United States. What happened with regard to the assassination of President Kennedy is a very good example. So we set forth that the possession of weapons by people of the type I have described—a description broad enough to include Mr. Oswald—would be a threat to the safety of the President of the United States and a threat to the Vice President of the United States. We employ many Secret Service agents to protect the lives of the President and the Vice President from people of that sort. We have passed a law making it a Federal crime for one to assassinate the President. If we have a right to pass that law, we certainly have a right to take measures to protect the lives of the President and the Vice President.

"Then we say that the possession and transportation of firearms by these people is an impediment or a threat to the exercise of free speech and to the exercise of religion guaranteed by the first amendment to the Constitution of the United States. That clause, of course, could clearly pertain to this Government's right to protect citizens, such as Martin Luther King, who are

379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); White v. United States, 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928, 89 S.Ct. 260, 21 L.Ed.2d 266 (1968); White v. United States, 399 F.2d 813 (8th Cir. 1968). It is equally unnecessary to labor over the power to strike at dangers to the President or other federal officials whose security is a matter of "overwhelming" national concern. Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); In re Neagle, 135 U.S. 1, 59, 10 S.Ct. 658, 34 L.Ed. 55 (1890). The defendant does not quite say, but tentatively hints, that there may be constitutional doubts about the statute as it has been defined to apply to his case. The court perceives no solid basis for such doubts.

It is concluded that the Congress could and did mean to reach cases like this one. Accordingly, defendant's motion is denied.

So ordered.

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expressing either religious or political views and whose life might be endangered because someone did not agree with what they were saying." 114 Cong. Rec. 13,869 (1968).

"* * * this would make it apply to the gun Oswald had with which he killed John F. Kennedy.

"It would mean that Oswald * * * would not have had the right to carry that gun or practice with it or do anything else with it.

"Assuming that * * * this man Galt—a loser many times over, a felon, and an habitual criminal—was the man who killed Martin Luther King, this provision would have applied to him, too." 114 Cong.Rec. 14,773 (1968).

"While this, of course, could have saved every person who has been assassinated—certainly, it would not have saved my father—at the same time, it would apply to many of the most fiendish assassinations that have occurred in our time." 114 Cong.Rec. 14,774 (1968).

Congressman Pollock:

"* * * we in this august body are faced with a somber and determined mood and temper of the Nation in the wake of riots and of the brutal, senseless slayings of Senator Robert F. Kennedy and Dr. Martin Luther King, a collective mood and temper which demand action * * *." 114 Cong.Rec. 16,297 (1968).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 204—SEPTEMBER TERM, 1970

(ARGUED SEPTEMBER 30, 1970, DECIDED NOVEMBER 30, 1970.)

DOCKET NO. 34640

UNITED STATES OF AMERICA, APPELLEE

v.

DENNETH BASS, DEFENDANT-APPELLANT

Before: DANAHER,* FRIENDLY AND HAYS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* convicting appellant, after a jury trial, of two counts of possession of firearms in violation of 18 U.S.C. (Appendix) § 1202(a)(1) (Supp. V. 1970).

Reversed.

GERALD A. FEFFER (Milton Adler, Legal Aid Society, New York, New York, on the brief), *for Appellant.*

BOBBY C. LAWYER, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Thomas J. Fitzpatrick, Assistant United States Attorney, on the brief), *for Appellee.*

HAYS, *Circuit Judge:* This is an appeal from a judgment entered in the United States District Court for the Southern District of New York convicting appellant of two counts of possessing firearms in violation of 18 U.S.C. (Appendix) § 1202(a)(1) (Supp. V. 1970). Appellant was sentenced to fifteen months imprisonment on each of the two counts, the terms to run concurrently.

The indictment in this case stems from an investigation by a United States treasury agent of suspected narcotics violations by appellant. Agent George Jordan, acting in an

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* Senior Judge, Court of Appeals for the District of Columbia Circuit, sitting by designation.

undercover capacity, met the appellant at his home in order to arrange a purchase of narcotics. Appellant directed Jordan to the basement where the purchase was made from an unknown person. The following day, the agent returned and purchased a quantity of narcotics directly from appellant. At this time, the agent observed that appellant was carrying a Baretta automatic pistol. Jordan obtained an arrest warrant for appellant and a search warrant for appellant's apartment. He then proceeded to the apartment and, after being admitted, observed a sawed-off shotgun on a night table. At this time, other agents knocked on the door and announced themselves; appellant fled and was apprehended at the rear door by a waiting agent. The subsequent search of the apartment produced the Baretta, which was under a bathtub.

The statute under which appellant was convicted provides:

> "(a) Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions or
>
> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."
>
> 18 U.S.C. (Appendix) § 1202(a). (Supp. V. 1970).

It was stipulated at trial that defendant had been previously convicted of the felony of attempted grand larceny in the second degree, so as to place him within the scope of the statute. At trial, appellant did not deny ownership of

either the apartment or the weapons. His contention here is that as the government did not specifically allege and prove that the possession of the firearm was "in commerce or affecting commerce," the statutory requirements for conviction have not been fulfilled. Alternatively, defendant argues that should the statute be interpreted to allow conviction for possession of a firearm without proof of some connection with interstate commerce, it would be unconstitutional. Since we agree with the first contention and also with the second to the extent of believing that the Government's construction would create serious constitutional doubts, we reverse appellant's conviction.

I

The controversy over the proper interpretation of the statute involves the question of whether the phrase "in commerce or affecting commerce" modifies "transports" alone or whether it also applies to receipt and possession. This question has plagued several district courts, with conflicting results.[1] In the only Court of Appeals decision interpreting the statute, *United States* v. *Daniels*, — F. 2d — (9th Cir. 1970), the Ninth Circuit affirmed the conviction, simply citing the opinion of the district court in the instant case, 308 F. Supp. 1385 (S.D.N.Y. 1970). At least part of the confusion can be attributed to a most unedifying and inadequate legislative history. Sections 1201 and 1202 of Title 18 U.S.C. (Appendix) were enacted as part of the Omnibus Crime Control and Safe Streets Act. After extended debate on numerous controversial issues, these two sections, known collectively as Title VII, were introduced on the floor by Senator Long. He twice set forth the purpose of the Amendment. 114 Cong. Rec. 13,867–69, 14,772–75, 90th Cong., 2d Sess. (1968). After his second speech, there was some brief debate; the few thoughts that were expressed seemed to favor the amendment in principle, but there appeared to be a desire for further study. Unex-

[1] *United States* v. *Harbin*, 313 F. Supp. 50 (N.D. Ind. 1970); *United States* v. *Francis*, Cr. No. 12,684 (E.D. Tenn., Dec. 12, 1969); *United States* v. *Phelps*, Cr. No. 14,465 (M.D. Tenn., Feb. 10, 1970); *United States* v. *Davis*, No. ORG 69126-K (N.D. Miss., July 2, 1970); *United States* v. *Vicary*, Cr. No. 44205 (E.D. Mich., June 29, 1970).

pectedly, however, a vote was called for, and Title VII passed with no further discussion, and no amendment.

Absent meaningful legislative history as to whether proof of some connection with interstate commerce was intended to be a prerequisite for prosecution for receipt and possession as well as transportation, the government relies on "one of the simplest canons of statutory construction," *United States ex rel. Santarelli* v. *Hughes*, 116 F.2d 613, 616 (3rd Cir. 1940), that is, that a limiting clause is deemed to apply solely to its last antecedent unless the subject matter requires a different construction. See *FTC* v. *Mandel Brothers Inc.*, 359 U.S. 385, 389 (1959). The word "transports," the government argues, is the only word modified by the commerce requirement, a conclusion which the government further supports by citing the arrangement of the commas. The argument, though it may be technically precise, leads to an illogical conclusion. Interpreting the commerce requirement to modify only the "transports" clause means that, although intrastate receipt and possession are punishable under the statute, intrastate transportation is not. Moreover if both "receipt" and "possession" are punishable without regard to the interstate elements, the modifying clause is meaningless, since there can scarcely be "transportation," whether intrastate or interstate, without an accompanying receipt or possession. Thus, in order to argue that a commerce requirement is not imposed by the statute on "receipt" or "possession," the government is forced to take the position that the commerce requirement of the statute is either totally illogical or mere surplusage.

It is considerably more probable that the commerce language was inserted to avoid questions of the scope of Congressional power and to mirror the approach to federal criminal jurisdiction reflected in many other federal statutes. See, e.g., 18 U.S.C. § 1951 (1964) (obstructing or affecting interstate commerce or movements of commodities in commerce by robbery or extortion); 18 U.S.C. § 875 (1964) (transmitting kidnapping or extortion threats by means of interstate commerce); 18 U.S.C. § 2421 (1964) (transporting women in interstate commerce for prostitution).

The government also attempts to support its reading of the statute by reference to Section 1201, which provides:

> "The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

This provision was part of the original proposal offered by Senator Long on the floor of the Senate and accepted with no substantial discussion. 114 Cong. Rec. 13,867, 90th Cong., 2d Sess. (1968).

The section lists four separate threats posed by the receipt, possession or transportation of firearms, only one of which deals with burdens on interstate commerce. From this the government reasons that there was no intent to impose a commerce requirement. Although these "findings" may be designed to provide additional constitutional bases for the legislation, a matter which we shall deal with shortly, the incorporation of the commerce language into both Sections 1201 and 1202 indicates the fallacy of the contention that as a matter of statutory interpretation the other "findings" can support a conviction without a proof of a commerce connection. Once again, the government is left with the position that the language employed in Section 1202 is mere surplusage, a contention that is as unsatisfactory here as it was in the context of the government's grammatical argument.

II

One further factor compels us to interpret the statute as requiring a showing that receipt or possession must be in or affecting interstate commerce. Although grammatical statutory maxims have proved inadequate in this case, there remains the cardinal principle of both statutory construction and constitutional law requiring the interpretation of statutes, if possible,[2] to avoid a reading which would create serious constitutional doubts. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Justice Brandeis concurring); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Lucas* v. *Alexander*, 279 U.S. 573, 577 (1929); *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 346 (1928); *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927). A situation in which, as here, an interpretation not entailing constitutional doubts can be reached independently, provides a particularly appropriate occasion for the application of the principle. See, e.g., *Kent* v. *Dulles*, 357 U.S. 116 (1958).

There is serious doubt in the present case whether the statute, if given the interpretation for which the government contends, could withstand constitutional scrutiny. To establish constitutionality the government relies upon such cases as *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Darby*, 312 U.S. 100 (1941). In each of these cases there is something more than the mere bald assertion that a particular activity is a burden on interstate commerce. For example, the statute involved in *Heart of Atlanta Motel* v. *United States*, *supra*, was carefully circumscribed to apply only to establishments providing lodging to transient guests, an activity which it was said, affects interstate commerce per se. In *Katzenbach* v. *McClung*, *supra*, only restaurants which served food, a substantial amount of which moved in commerce, or which served or offered to serve interstate trav-

[2] Resort to this principle of statutory construction in this case does not lead to "distortions of statutes and manipulations of narrow constitutional doctrines." Gunther, The Subtle Vices of the "Passive Virtures"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 21 (1964).

elers, were subject to the statute. In *Maryland* v. *Wirtz, supra, the* only enterprises employees of which were covered by the statute were those which engaged in commerce or in production of goods for commerce.

White v. *United States,* 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928 (1968), relied on so heavily by the government, is factually distinct, even if we were inclined to accept its holding for purposes of determining this case. In the first place, Congress, in enacting the 1965 amendments to the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301–392 made findings based not on conjecture but on committee hearings. *White* v. *United States, supra* at 6. More importantly, the court itself recognized the distinct problems inherent in the field of drug regulation:

> "Unlike many other objects of federal regulation, depressant and stimulant drugs are not an inert, passive substance, which, after use, pass into the realm of statistics of consumption. They exert an influence on the consumer, which may spell danger or disaster for people or property from or in other states. As for distribution Congress has acknowledged that attempts prior to 1965 to regulate proscribed interstate traffic have failed because of the impracticality and impossibility of determining source of origin identification." 395 F.2d at 7.

Even in *United States* v. *Perez,* 426 F.2d 1073 (2d Cir. 1970), there was at least some evidence that Congress probed the commerce clause basis of the statute and made substantial findings. 426 F.2d at 1078–80 and nn. 3–5. This may all be contrasted with the findings in this case, if indeed they may be so characterized. All that is present in the "debates" is statements by the bill's author based on nothing but conjecture and a series of inferences which, if accepted, would support federal legislation concerning almost any criminal matter. 114 Cong. Rec., *supra.*

An interpretation of the statute that would allow prosecution for receipt or possession of firearms without a showing in each case that such receipt or possession was in or affecting interstate commerce would be an unprecedented extension of federal power. "There is no Supreme Court

case which suggests that Congress can ignore the requirement that some connection with interstate commerce must be established as a basis for conviction of a federal crime where the power of Congress to enact the statute is derived from the commerce clause." See discussion of *United States* v. *Denmark*, 346 U.S. 441 (1953) in *United States* v. *Perez*, *supra* at 1082–1083 (dissenting opinion).

Reliance on the "findings" in section 1201 will not suffice to avoid the constitutional difficulties. It should first be pointed out that the inclusion of the commerce finding, alone, in the body of section 1202 suggests that Congress as a whole regarded the commerce clause as the source of its authority in this matter. In any case, the three alternative "findings," like the "burden on commerce" finding, are nothing more than assertions that a constitutional basis for such legislation exists. It is simply not enough, however, to proclaim that receipt or possession of firearms impedes, for example, free speech; it might just as well be argued that burglary of a house of worship impedes religious freedom and that therefore, a federal offense can be fashioned. Surely we have a right to expect that were such a departure from basic principles of federalism in the area of criminal law intended, particularly on such novel and esoteric theories, more consideration would have been given to the statute before its enactment.

Thus, the only rational interpretation of the statute, and the only interpretation of the statute that can avoid otherwise serious constitutional doubts is that which requires that receipt and possession, as well as transportation, be shown, in each case, to have been "in commerce or affecting commerce."[3] Since such a showing was not made by the government in this case, appellant's conviction cannot stand.

Because of the result we have reached, there is no need to discuss appellant's further contention that the definition of "felony" in § 1202(c)(2) denies him the equal protection of the laws.

Reversed.

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[3] Compare *Haynes* v. *United States*, 390 U.S. 85, 88, 98 (1968), where it is made apparent that the National Firearms Act was predicated upon an exercise of Congressional power in the field of taxation.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and seventy.

Present: Hon. JOHN A. DANAHER, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DENNETH BASS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk.*

SUPREME COURT OF THE UNITED STATES

No. 1285- - - -, October Term, 1970

UNITED STATES,
PETITIONER,

v.

DENNETH BASS

ORDER ALLOWING CERTIORARI. Filed March 29 -------, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second - - - - - -Circuit is granted.

☆ U.S. Government Printing Office: 1971—424-365/633

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DENNETH BASS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9–19) is not yet reported. The opinion of the district court (App. B, *infra*, pp. 21–27) is reported at 308 F. Supp. 1385.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 29) was entered on November 30, 1970. Mr. Justice Harlan extended the time for filing a petition

414-972—71——1

for a writ of certiorari to January 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether 18 U.S.C. App. (Supp. V) 1202(a) should be construed to prohibit any possession of a firearm by a felon, or only possession that is specifically "in commerce or affecting commerce."

STATUTES INVOLVED

18 U.S.C. App. (Supp. V) 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce * * * any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. (Supp. V) 1201 provides:

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons [and others covered by § 1202 (a)] * * * constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, respondent was convicted on two counts which charged him, as a previously convicted felon, with possessing firearms in violation of 18 U.S.C. App. (Supp. V) 1202(a). He was sentenced to concurrent prison terms of fifteen months. Following his conviction, respondent timely moved for an order in arrest of judgment on the ground that the indictment did not allege and the prosecution failed to prove that his possession of the firearms was "in commerce or affecting commerce" within the meaning of Section 1202(a).[1] The district court denied the motion, holding that the statutory phrase "in commerce or affecting commerce" modifies only the term "transports" and not the terms "receives" and "possesses" (App. B, *infra,*

[1] Section 1202(c)(1) defines "commerce" to mean interstate commerce.

pp. 22–25). The court found this interpretation of the statute supported by its legislative history and the formal congressional findings expressed in Section 1201. Finally, the district court held that the statute as so construed was constitutional (App. B, *infra,* pp. 26–27).

On appeal, the court of appeals reversed (App. A, *infra,* pp. 9–19). The court found that, notwithstanding the grammatical context of the "commerce" phrase and the statute's legislative history, Section 1202(a) should be construed to require an allegation and proof of an effect on interstate commerce of the felon's possession (App. A, *infra,* pp. 12–15). The court reasoned that it would have been illogical for Congress to condition a transportation charge on the showing of a connection with commerce while exempting possession and receipt charges from the same showing—particularly since a transportation would necessarily involve a receipt or possession (App. A, *infra,* p. 13). The court was also of the view that substantial constitutional doubts about Congress' power to enact the statute would exist if the law were construed not to require a showing that a felon's possession was in interstate commerce (App. A, *infra,* pp. 15–19).

REASONS FOR GRANTING THE WRIT

In the relatively brief period since Section 1202(a) was enacted (June 19, 1968), approximately 150 prosecutions of the present type have been brought, of which a substantial number are pending. The courts of appeals and district courts have sharply divided on the issue whether the statute requires specific alle-

gation and proof that a felon's possession or receipt of a firearm had an interstate commerce connection. The decision below is directly contrary to the majority of decisions rendered, including specific holdings by the Fourth and Ninth Circuits. *United States* v. *Cabbler*, 429 F. 2d 577 (C.A. 4), certiorari denied, November 9, 1970 (No. 525 this Term); *United States* v. *Daniels*, 431 F. 2d 697 (C.A. 9). Compare *United States* v. *Wiley*, 309 F. Supp. 141 (D. Minn.) and *United States* v. *Davis*, 314 F. Supp. 1161, 1165–1167 (N.D. Miss.) (both upholding the government's construction of the statute) with *United States* v. *Harbin*, 313 F. Supp. 50 (N.D. Ind.).[2] It is apparent, therefore, that the proper construction of the statute is a question of importance warranting resolution by this Court.

While the statute is not a model of logic or clarity, we think that the conclusion below is not required by the statutory language and is inconsistent with the legislative history. As the opinions below point out, the statute was the result of an amendment on the floor of the Senate to the bill that became the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197. It was passed with little discussion apart from an explanation of its provisions by its sponsor, Senator Long. 114 Cong. Rec. 13,867–13,869, 14,772–14,775 (90th Cong., 2d Sess.). That explanation, however, left no doubt that the intended effect of the amend-

[2] The question is pending before the Sixth, Eighth and Tenth Circuits in cases already briefed and argued.

ment was to make any possession of firearms by a felon a federal offense. Senator Long stated (114 Cong. Rec. 13,868):

> I have prepared an amendment * * * simply setting forth the fact that anybody who has been convicted of a felony * * * is not permitted to possess a firearm * * *.

Earlier, at the time the amendment was adopted, he indicated that the amendment sought to "make it unlawful for a firearm * * * to be in possession of convicted felon." He answered in the negative a question from Senator McClellan as to whether a felon could possess a firearm in his own home (114 Cong. Rec. 14,773, 14,774).

While it is admittedly difficult to perceive any rationale for requiring a showing of an interstate commerce connection as to the crime of transporting a firearm by a felon without requiring a similar showing with respect to the possession and receipt prohibitions, we point out that the contrary construction does even greater violence to traditional tenets of statutory construction by attributing to Congress the intent to pass an almost wholly redundant statute. Since 1961, it has been a federal crime for any felon to "receive any firearm * * * which has been shipped or transported in interstate or foreign commerce" or to ship, transport or cause to be shipped or transported any such firearm.

15 U.S.C. 902(e), (f).[3] These statutes were repealed and recodified in somewhat expanded form in title IV of the same 1968 Omnibus Crime bill of which the present Section (1202(a)) was a part, and are now found in 18 U.S.C. (Supp. V) 922(g), (h).

These recodified sections make it a crime for a felon "to ship or transport any firearm * * * in interstate or foreign commerce" or to receive any firearm which has been so shipped or transported. Since receipt (and hence possession) of a firearm "in interstate * * * commerce" has thus been a crime—punishable by imprisonment for up to five years (see former 15 U.S.C. 905; 18 U.S.C. (Supp. V) 924(a))—both prior to and after 1968, the construction of Section 1202(a) by the court below to cover the same ground relegates that statute in its entirety to virtual redundancy. Given the choice between making the entire amendment superfluous and leaving a possible question of consistency in only one clause of the amendment, we submit that the latter is more rational, since it gives effect to the clear intent of Congress.

The doubts of the court of appeals about the constitutionality of the statute as so construed are not warranted. Although no studies or extensive debate accompanied Section 1202(a), Congress had ample basis in recent official reports on crime for its conclu-

[3] This statute was originally passed in 1938 limited to persons convicted of a crime of violence.

sion in Section 1201 that possession of firearms by felons constitutes a burden on interstate commerce, as well as a threat to the safety of the President and Vice President of the United States, and to the continued and effective operation of the governments of the United States and the various States. See, *e.g.*, Staff Report to the National Commission on the Causes and Prevention of Violence, *Firearms and Violence in American Life* (1969); S. Reps. Nos. 1097, 1501, 90th Cong., 2d Sess.; H. Rep. No. 1577, 90th Cong., 2d Sess.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

JANUARY 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 204—SEPTEMBER TERM, 1970

(ARGUED SEPTEMBER 30, 1970, DECIDED NOVEMBER 30, 1970.)

DOCKET NO. 34640

UNITED STATES OF AMERICA, APPELLEE

v.

DENNETH BASS, DEFENDANT-APPELLANT

Before: DANAHER,* FRIENDLY AND HAYS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* convicting appellant, after a jury trial, of two counts of possession of firearms in violation of 18 U.S.C. (Appendix) § 1202(a)(1) (Supp. V. 1970).

Reversed.

GERALD A. FEFFER (Milton Adler, Legal Aid Society, New York, New York, on the brief), *for Appellant.*

*Senior Judge, Court of Appeals for the District of Columbia Circuit, sitting by designation.

414-972—71——2

BOBBY C. LAWYER, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Thomas J. Fitzpatrick, Assistant United States Attorney, on the brief), *for Appellee.*

HAYS, *Circuit Judge:* This is an appeal from a judgment entered in the United States District Court for the Southern District of New York convicting appellant of two counts of possessing firearms in violation of 18 U.S.C. (Appendix) § 1202(a)(1) (Supp. V. 1970). Appellant was sentenced to fifteen months imprisonment on each of the two counts, the terms to run concurrently.

The indictment in this case stems from an investigation by a United States treasury agent of suspected narcotics violations by appellant. Agent George Jordan, acting in an undercover capacity, met the appellant at his home in order to arrange a purchase of narcotics. Appellant directed Jordan to the basement where the purchase was made from an unknown person. The following day, the agent returned and purchased a quantity of narcotics directly from appellant. At this time, the agent observed that appellant was carrying a Baretta automatic pistol. Jordan obtained an arrest warrant for appellant and a search warrant for appellant's apartment. He then proceeded to the apartment and, after being admitted, observed a sawed-off shotgun on a night table. At this time, other agents knocked on the door and announced themselves; appellant fled and was apprehended at the rear door by a waiting agent. The subsequent search of the apartment produced the Baretta, which was under a bathtub.

The statute under which appellant was convicted provides:

> "(a) Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions or
>
> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."
>
> 18 U.S.C. (Appendix) § 1202(a) (Supp. V. 1970).

It was stipulated at trial that defendant had been previously convicted of the felony of attempted grand larceny in the second degree, so as to place him within the scope of the statute. At trial, appellant did not dency ownership of either the apartment or the weapons. His contention here is that as the government did not specifically allege and prove that the possession of the firearm was "in commerce or affecting commerce," the statutory requirements for conviction have not been fulfilled. Alternatively, defendant argues that should the statute be interpreted to allow conviction for possession of a firearm without proof of some connection with interstate commerce, it would

be unconstitutional. Since we agree with the first contention and also with the second to the extent of believing that the Government's construction would create serious constitutional doubts, we reverse appellant's conviction.

I

The controversy over the proper interpretation of the statute involves the question of whether the phrase "in commerce or affecting commerce" modifies "transports" alone or whether it also applies to receipt and possession. This question has plagued several district courts, with conflicting results.[1] In the only Court of Appeals decision interpreting the statute, *United States* v. *Daniels*, — F. 2d — (9th Cir. 1970), the Ninth Circuit affirmed the conviction, simply citing the opinion of the district court in the instant case, 308 F. Supp. 1385 (S.D.N.Y. 1970). At least part of the confusion can be attributed to a most unedifying and inadequate legislative history. Sections 1201 and 1202 of Title 18 U.S.C. (Appendix) were enacted as part of the Omnibus Crime Control and Safe Streets Act. After extended debate on numerous controversial issues, these two sections, known collectively as Title VII, were introduced on the floor by Senator Long. He twice set forth the purpose of the Amendment. 114 Cong. Rec. 13,867–69, 14,772–75, 90th Cong., 2d Sess. (1968). After his second speech, there was some brief debate; the few thoughts that were expressed seemed to favor the amendment in principle, but there

[1] *United States* v. *Harbin*, 313 F. Supp. 50 (N.D. Ind. 1970); *United States* v. *Francis*, Cr. No. 12,684 (E.D. Tenn., Dec. 12, 1969); *United States* v. *Phelps*, Cr. No. 14,465 (M.D. Tenn., Feb. 10, 1970); *United States* v. *Davis*, No. ORG 69126-K (N.D. Miss., July 2, 1970); *United States* v. *Vicary*, Cr. No. 44205 (E.D. Mich., June 29, 1970).

appeared to be a desire for further study. Unexpectedly, however, a vote was called for, and Title VII passed with no further discussion, and no amendment.

Absent meaningful legislative history as to whether proof of some connection with interstate commerce was intended to be a prerequisite for prosecution for receipt and possession as well as transportation, the government relies on "one of the simplest canons of statutory construction," *United States ex rel. Santarelli* v. *Hughes*, 116 F.2d 613, 616 (3rd Cir. 1940), that is, that a limiting clause is deemed to apply solely to its last antecedent unless the subject matter requires a different construction. See *FTC* v. *Mandel Brothers Inc.*, 359 U.S. 385, 389 (1959). The word "transports," the government argues, is the only word modified by the commerce requirement, a conclusion which the government further supports by citing the arrangement of the commas. The argument, though it may be technically precise, leads to an illogical conclusion. Interpreting the commerce requirement to modify only the "transports" clause means that, although intrastate receipt and possession are punishable under the statute, intrastate transportation is not. Moreover if both "receipt" and "possession" are punishable without regard to the interstate elements, the modifying clause is meaningless, since there can scarcely be "transportation," whether intrastate or interstate, without an accompanying receipt or possession. Thus, in order to argue that a commerce requirement is not imposed by the statute on "receipt" or "possession," the government is forced to take the position that the commerce requirement of the statute is either totally illogical or mere surplusage.

It is considerably more probable that the commerce language was inserted to avoid questions of the scope

of Congressional power and to mirror the approach to federal criminal jurisdiction reflected in many other federal statutes. See, e.g., 18 U.S.C. § 1951 (1964) (obstructing or affecting interstate commerce or movements of commodities in commerce by robbery or extortion); 18 U.S.C. § 875 (1964) (transmitting kidnapping or extortion threats by means of interstate commerce); 18 U.S.C. § 2421 (1964) (transporting women in interstate commerce for prostitution).

The government also attempts to support its reading of the statute by reference to Section 1201, which provides:

> "The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

This provision was part of the original proposal offered by Senator Long on the floor of the Senate and accepted with no substantial discussion. 114 Cong. Rec. 13,867, 90th Cong., 2d Sess. (1968).

The section lists four separate threats posed by the receipt, possession or transportation of firearms, only

one of which deals with burdens on interstate commerce. From this the government reasons that there was no intent to impose a commerce requirement. Although these "findings" may be designed to provide additional constitutional bases for the legislation, a matter which we shall deal with shortly, the incorporation of the commerce language into both Sections 1201 and 1202 indicates the fallacy of the contention that as a matter of statutory interpretation the other "findings" can support a conviction without a proof of a commerce connection. Once again, the government is left with the position that the language employed in Section 1202 is mere surplusage, a contention that is as unsatisfactory here as it was in the context of the government's grammatical argument.

II

One further factor compels us to interpret the statute as requiring a showing that receipt or possession must be in or affecting interstate commerce. Although grammatical statutory maxims have proved inadequate in this case, there remains the cardinal principle of both statutory construction and constitutional law requiring the interpretation of satutes, if possible,[2] to avoid a reading which would create serious constitutional doubts. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348 (1936) (Justice Brandeis concurring); *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932); *Lucas* v. *Alexander,* 279 U.S. 573, 577 (1929); *Richmond Screw Anchor Co.* v. *United States,* 275

[2] Resort to this principle of statutory construction in this case does not lead to "distortions of statutes and manipulations of narrow constitutional doctrines." Gunther, The Subtle Vices of the "Passive Virtures"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 21 (1964).

U.S. 331, 346 (1928); *Blodgett* v. *Holden,* 275 U.S. 142, 148 (1927). A situation in which, as here, an interpretation not entailing constituional doubts can be reached independently, provides a particularly appropriate occasion for the application of the principle. See, e.g., *Kent* v. *Dulles,* 357 U.S. 116 (1958).

There is serious doubt in the present case whether the statute, if given the interpretation for which the government contends, could withstand constitutional scrutiny. To establish constitutionality the government relies upon such cases as *Maryland* v. *Wirtz,* 392 U.S. 183 (1968); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Wickard* v. *Filburn,* 317 U.S. 111 (1942); *United States* v. *Darby,* 312 U.S. 100 (1941). In each of these cases there is something more than the mere bald assertion that a particular activity is a burden on interstate commerce. For example, the statute involved in *Heart of Atlanta Motel* v. *United States, supra,* was carefully circumscribed to apply only to establishments providing lodging to transient guests, an activity which it was said, affects interstate commerce per se. In *Katzenbach* v. *McClung, supra,* only restaurants which served food, a substantial amount of which moved in commerce, or which served or offered to serve interstate travelers, were subject to the statute. In *Maryland* v. *Wirt, supra, the* only enterprises employees of which were covered by the statute were those which engaged in commerce or in production of goods for commerce.

White v. *United States,* 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928 (1968), relied on so heavily by the government, is factually distinct, even if we were inclined to accept its holding for purposes of deter-

mining this case. In the first place, Congress, in enacting the 1965 amendments to the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301–392 made findings based not on conjecture but on committee hearings. *White* v. *United States, supra* at 6. More importantly, the court itself recognized the distinct problems inherent in the field of drug regulation:

> "Unlike many other objects of federal regulation, depressant and stimulant drugs are not an inert, passive substance, which, after use, pass into the realm of statistics of consumption. They exert an influence on the consumer, which may spell danger or disaster for people or property from or in other states. As for distribution Congress has asknowledged that attempts prior to 1965 to regulate proscribed interstate traffic have failed because of the impracticality and impossibility of determining source of origin identification." 395 F.2d at 7.

Even in *United States* v. *Perez,* 426 F.2d 1073 (2d Cir. 1970), there was at least some evidence that Congress probed the commerce clause basis of the statute and made substantial findings. 426 F.2d at 1078–80 and nn. 3–5. This may all be contrasted with the findings in this case, if indeed they may be so characterized. All that is present in the "debates" is statements by the bill's author based on nothing but conjecture and a series of inferences which, if accepted, would support federal legislation concerning almost any criminal matter. 114 Cong. Rec., *supra.*

An interpretation of the statute that would allow prosecution for receipt or possession of firearms without a showing in each case that such receipt or posses-

sion was in or affecting interstate commerce would be an unprecedented extension of federal power. "There is no Supreme Court case which suggests that Congress can ignore the requirement that some connection with interstate commerce must be established as a basis for conviction of a federal crime where the power of Congress to enact the statute is derived from the commerce clause." See discussion of *United States* v. *Denmark,* 346 U.S. 441 (1953) in *United States* v. *Perez, supra* at 1082–1083 (dissenting opinion).

Reliance on the "findings" in section 1201 will not suffice to avoid the constitutional difficulties. It should first be pointed out that the inclusion of the commerce finding, alone, in the body of section 1202 suggests that Congress as a whole regarded the commerce clause as the source of its authority in this matter. In any case, the three alternative "findings," like the "burden on commerce" finding, are nothing more than assertions that a constitutional basis for such legislation exists. It is simply not enough, however, to proclaim that receipt or possession of firearms impedes, for example, free speech; it might just as well be argued that burglary of a house of worship impedes religious freedom and that therefore, a federal offense can be fashioned. Surely we have a right to expect that were such a departure from basic principles of federalism in the area of criminal law intended, particularly on such novel and esoteric theories, more consideration would have been given to the statute before its enactment.

Thus, the only rational interpretation of the statute, and the only interpretation of the statute that can avoid otherwise serious constitutional doubts is that which requires that receipt and possession, as well as transportation, be shown, in each case, to have been

"in commerce or affecting commerce."[3] Since such a showing was not made by the government in this case, appellant's conviction cannot stand.

Because of the result we have reached, there is no need to discuss appellant's further contention that the definition of "felony" in § 1202(c)(2) denies him the equal protection of the laws.

Reversed.

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[3] Compare *Haynes* v. *United States*, 390 U.S. 85, 88, 98 (1968), where it is made apparent that the National Firearms Act was predicated upon an exercise of Congressional power in the field of taxation.

APPENDIX B

UNITED STATES OF AMERICA

v.

DENNETH BASS, DEFENDANT

No. 69 CR. 881

UNITED STATES DISTRICT COURT, S.D. NEW YORK.
FEB. 19, 1970.

Robt. M. Morgenthau, U.S. Atty., for the Southern District of New York, Thomas J. Fitzpatrick, Asst. U.S. Atty., of counsel for the Government.

Lawrence Kessler, New York City, for defendant.

MEMORANDUM

FRANKEL, District Judge.

Defendant has been found guilty by a jury under two counts of an indictment charging that on two specified occasions, having been previously convicted of a state felony, he possessed a firearm, thus violating 18 U.S.C. App. § 1202(a)(1). That statute says in pertinent part:

> "Any person who * * * has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

It was stipulated that defendant had been convicted in the Supreme Court of New York, Bronx County, on or about February 1, 1968, of attempted grand larceny in the second degree, a felony. Thereafter, it was provided, on July 29 and July 30, 1969, he had in his possession a firearm, a pistol and then a shotgun, respectively.

There was no allegation in the indictment and no attempt by the prosecution to show that the possession of the firearm on either occasion transpired "in commerce or affecting commerce * * *." The absence of this element, defendant now urges, vitiates the conviction. Contending that the statute was intended to reach possession of firearms by convicted felons only if such possession was shown in fact to be "in commerce or affecting commerce," he moves for an order in arrest of judgment or for a judgment of acquittal.

For reasons which follow, the court holds erroneous the statutory construction upon which the motion is predicated.

To begin with, there is some modest, if by no means decisive, force in the government's grammatical analysis of the statutory text. The words "in commerce or affecting commerce" follow "transports," not "possesses," and there are words of approval in the books for the canon that such qualifying phrases, especially where the commas are arrayed like those here in question, should be deemed to relate only to the last antecedent. See F. T. C. v. Mandel Brothers, 359 U.S. 385, 389–390, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); T. I. McCormack Trucking Co. v. United States, 298 F. Supp. 39, 41 (D.N.J.1969); 2 Sutherland, Statutory Construction § 4921 (3rd ed. 1943). As is often the case, however, see K. Llewellyn, The Common Law Tradition 522–28 (1960), there is a

contradictory canon in defendant's arsenal: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." Porto Rico Ry. Light & Power Co. v. Mor, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920); United States v. Standard Brewery, 251 U.S. 210, 218, 40 S.Ct. 139, 64 L.Ed. 229 (1920); Buscaglia v. Bowie, 139 F.2d 294, 296 (1st Cir. 1943); 2 Sutherland, loc. cit. *supra.*

Here, as elsewhere, then, the battle of canons and commas leaves us to seek for clues more promising to the legislative meaning.

The more substantial indicia in the statutory language and the pertinent, if somewhat sketchy, items of legislative history serve in total effect to refute defendant's argument. When the statute before us was enacted, the Congress and its constituencies were deeply disturbed by a recent history of horrible assassinations. At the same time the economic and human costs of individual and "organized" lawlessness were subjects of highly vocal concern. In that setting, the legislative findings are promptly intelligible and apposite here. The statute reported, *inter alia,* these centrally significant judgments of legislative fact:

> "* * * that the receipt, possession, or transportation of a firearm by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce, [and]
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States * * *."

Both of the evils thus identified could be mitigated, and were intended to be mitigated, by forbidding possession of firearms to the specified classes of specially risky people, regardless of whether the possession itself occurred "in commerce or affecting commerce * * *." As was said by Senator Russell Long, sponsor of the amendment which became Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, 82 Stat. 197:[1]

"* * * Congress simply finds that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.

"You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you

[1] Sections 1201 and 1202 of Title 18 U.S.C. App. were enacted as Title VII of the Omnibus Crime Control and Safe Streets Act. The bill which (after thorough transformation) became that Act, H.R. 5037, 90th Cong., 1st Sess., started its legislative career as a measure designed to aid state and local governments in law enforcement by financial and administrative assistance. See H.R. Rep. No. 488 90th Cong., 1st Sess. (July 17, 1967). This bill passed the House August 8, 1967, and went to the Senate. A similar bill was introduced in the Senate (S. 917) and went to the Committee on the Judiciary, which rewrote it completely. See S. Rep. No. 1097, 90th Cong., 2d Sess. (April 29, 1968). The amendments included much debated provisions regarding the admissibility of confessions, wiretapping and state firearms control.

On May 17, 1968, Senator Long introduced on the floor his amendment to S. 917, which he designated Title VII. His introductory remarks set forth the purpose of the amendment. 114 Cong. Rec. 13,867–69. About a week later he explained once again the proposed effect of the addition. There was brief debate; the reaction appeared favorable but cautious. Unexpectedly, however, there was a call for a vote, and Title VII passed without amendment or extended discussion. See 114 Cong. Rec. 14,772–75 (1968).

like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce." 114 Cong. Rec. 13,869 (1968).

Similarly, the recent deaths by gunshot of a President, a presidential candidate and a national civil rights leader gave tragic testimony that disturbed people carrying weapons did not have to cross state lines to pose grave threats with which the national government had occasion (and power) to cope.[2] See, e.g., 114 Cong. Rec. 13,868–13,871, 14,772–14,775 (1968) (Sen. Long); 114 Cong. Rec. 16,297 (1968) (Cong. Pollock).

The same day the Senate agreed to strike out the language of H.R. 5037 and substitute the text of S. 917 as amended. Following this, the new H.R. 5037 was passed by the Senate. The House passed it then on June 6, 1968, 114 Cong. Rec. 16,271–300, and it was signed by the President on June 19, 1968.

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[2] Senator Russell Long:

"* * * we clearly have a right to protect the life of the President of the United States. What happened with regard to the assassination of President Kennedy is a very good example. So we set forth that the possession of weapons by people of the type I have described—a description broad enough to include Mr. Oswald—would be a threat to the safety of the President of the United States and a threat to the Vice President of the United States. We employ many Secret Service agents to protect the lives of the President and the Vice President from people of that sort. We have passed a law making it a Federal crime for one to assassinate the President. If we have a right to pass that law, we certainly have a right to take measures to protect the lives of the President and the Vice President.

"Then we say that the possession and transportation of firearms by these people is an impediment or a threat to the exercise of free speech and to the exercise of religion guaranteed by the first amendment to the Constitution of the United States. That clause, of course, could clearly pertain to this Govern-

There is no need at this date in our history to document at length the power of Congress to reach intrastate occurrences which, in their voluminous and cumulative impact, may or do threaten the course of interstate commerce. See Heart of Atlanta Motel v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); White v. United States, 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928, 89 S.Ct. 260, 21 L.Ed.2d 266 (1968); White v. United States, 399 F.2d 813 (8th Cir. 1968). It is equally unnecessary to labor

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ment's right to protect citizens, such as Martin Luther King, who are expressing either religious or political views and whose life might be endangered because someone did not agree with what they were saying." 114 Cong. Rec. 13,869 (1968).

"* * * this would make it apply to the gun Oswald had with which he killed John F. Kennedy.

"It would mean that Oswald * * * would not have had the right to carry that gun or practice with it or do anything else with it.

"Assuming that * * * this man Galt—a loser many times over, a felon, and an habitual criminal—was the man who killed Martin Luther King, this provision would have applied to him, too." 114 Cong.Rec. 14,773 (1968).

"While this, of course, could not have saved every person who has been assassinated—certainly, it would not have saved my father—at the same time, it would apply to many of the most fiendish assassinations that have occurred in our time." 114 Cong.Rec. 14,774 (1968).

Congressman Pollock:

"* * * we in this august body are faced with a somber and determined mood and temper of the Nation in the wake of riots and of the brutal, senseless slayings of Senator Robert F. Kennedy and Dr. Martin Luther King, a collective mood and temper which demand action * * *." 114 Cong.Rec. 16,297 (1968).

over the power to strike at dangers to the President or other federal officials whose security is a matter of "overwhelming" national concern. Watts v. United States, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); In re Neagle, 135 U.S. 1, 59, 10 S.Ct. 658, 34 L.Ed. 55 (1890). The defendant does not quite say, but tentatively hints, that there may be constitutional doubts about the statute as it has been defined to apply to his case. The court perceives no solid basis for such doubts.

It is concluded that the Congress could and did mean to reach cases like this one. Accordingly, defendant's motion is denied.

So ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and seventy.

Present: Hon. JOHN A. DANAHER, Hon. HENRY J. FREINDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DENNETH BASS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk.*

U.S. GOVERNMENT PRINTING OFFICE: 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1285

UNITED STATES OF AMERICA, PETITIONER

v.

DENNETH BASS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent argues in his brief in opposition (Br. 3) that there is "something less than a full-fledged conflict among the circuits" as to the statutory interpretation issue in this case because the cases cited in the government's petition from the Fourth and Ninth Circuits reaching a result contrary to the result below do not contain a plenary discussion of the question.[1] Subsequent to the filing of our petition for a writ of certiorari, the Eighth Circuit, in a comprehensive opinion reprinted as an appendix, *infra*, express-

[1] In one case, *United States* v. *Daniels*, 431 F. 2d 697 (C.A. 9), the court adopted the rationale of the district court in the instant case (see Pet. App. B), thus indicating its views with considerable specificity.

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ly noted its disagreement with the court of appeals' decision in this case. Thus, the decision of the Second Circuit below [2] now conflicts with the reasoning and result reached by three other circuits on the question, the importance of which respondent does not attempt to diminish.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1971.

[2] The decision below has recently been reported at 434 F. 2d 1296.

APPENDIX

United States Court of Appeals, for the Eighth Circuit

No. 20,438

UNITED STATES OF AMERICA, APPELLEE

v.

DALE EINAR SYNNES, APPELLANT

Appeal from the United States District Court for the District of Minnesota

February 1, 1971

Before MEHAFFY and HEANEY, Circuit Judges, and MEREDITH, District Judge.

HEANEY, *Circuit Judge.* This appeal, along with *United States* v. *Earthia B. Wiley,* No. 20,187 (8th Cir. February 1, 1971), and *United States* v. *John Arthur Taylor,* No. 20,387 (8th Cir. February 1, 1971), also decided today, presents to our Court for the first time the issues of the proper construction and the constitutionality of § 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197. This section provides:

> Any person who—
> (1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony * * *
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm, shall be

fined not more than $10,000 or imprisoned for not more than two years or both.

We affirm the judgment of conviction in each case.

We select *Synnes* as the case for a detailed opinion because it raises a double jeopardy issue not presented in *Wiley* or *Taylor*.

Defendant, Dale Einar Synnes, was charged with violation of § 1202(a)(1) by a federal grand jury on January 17, 1970. He waived trial by jury, and was tried in the United States District Court for the District of Minnesota. Two Minneapolis police officers testified that they arrested the defendant on August 15, 1969, and that he was in possession of a .38 caliber Smith & Wesson pistol at the time of his arrest. Records showing that the defendant had a prior felony conviction in the State of Minnesota were received in evidence.

The defendant presented no witnesses. Both sides stipulated that the defendant had previously been convicted under a Minneapolis city ordinance for being in possession of a firearm while a convicted felon, and that the prior conviction was based on the same evidence as that presented in the case being tried. The defendant was found guilty and sentenced to imprisonment for one year.

In each of the three cases under consideration, the government takes the position that it is necessary to show only (1) the knowing and willing (2) possession of a firearm (3) by a previously convicted felon. The defendants argue that these elements are insufficient to support a conviction, for two reasons:

(1) the statute specifically requires that the receipt, possession or transportation be in or affecting interstate commerce; and

(2) if the statute is not so interpreted, it is unconstitutional as an invalid exercise of power by Congress under the Commerce Clause.

The Courts of Appeals are in conflict on the question whether it is necessary to show a specific connection between interstate commerce and the particular act of receipt, possession or transportation being charged. The Fourth and Ninth Circuits have both held, in per curiam opinions, that the government need not prove that the firearm possessed by a defendant was in commerce or that his possession of it affected commerce. They further held the statute to be a valid exercise of congressional power. *United States* v. *Cabbler*, 429 F.2d 577 (4th Cir.), *cert. denied*, 39 L.W. 3200 (1970); *United States* v. *Daniels*, 431 F.2d 697 (9th Cir. 1970). However, the Second Circuit, in *United States* v. *Bass*, No. 34,640 (Nov. 30, 1970), held that to avoid serious constitutional problems, § 1202(a) should be interpreted to include a requirement that receipt and possession, as well as transportation, be shown in each case to have been "in commerce or affecting commerce." [1]

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[1] The United States District Courts are also split. The following decisions have upheld the validity of the government's construction of § 1202(1)(a): *United States* v. *Davis*, 314 F. Supp. 1161 (N.D. Miss. 1970); *United States* v. *Wiley*, 309 F.Supp. 141 (D. Minn. 1970), *United States* v. *Bass*, 308 F.Supp. 1386 (S.D. N.Y. 1970), *rev'd*. No. 34,640 (2nd Cir. Nov. 30, 1970) (but followed in *United States* v. *Daniels*, 431 F.2d 697 (9th Cir. 1970)); *United States* v. *Vicary*, No. 44,205 (E.D. Mich. June 29, 1970) (en banc); *United States* v. *Childress*, No. 8039-R (E.D. Va., Jan. 6, 1969).

However, construction given by the Second Circuit in *Bass* has been supported by: *United States* v. *Harbin*, 313 F.Supp. 50 (N.D. Ind. 1970); *United States* v. *Steed*, No. Cr. 70-57 (W.D. Tenn., May 11, 1970); *United States* v. *Phelps*, No. 14,465 (M.D. Tenn., Feb. 10, 1970); *United States* v. *Francis*, No. 12,684 (E.D. Tenn., Dec. 18, 1969).

Since the construction of statutes depends to some extent upon the constitutional options available,[2] we turn first to the problem of determining whether Congress is empowered to prohibit mere receipt or possession of a firearm by a felon.

The Commerce Clause of the Constitution, Art. I, § 8, cl. 3, combined with the Necessary and Proper Clause, Art. I, § 8, cl. 18, gives to Congress the power to regulate both interstate commerce and any intrastate activity which "* * * exerts a substantial economic effect on interstate commerce * * *." *Wickard* v. *Filburn*, 317 U.S. 111, 117 (1942). See also, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964). As Justice Black stated in his concurring opinion in *Heart of Atlanta Motel*:

> * * * [T]his Court has steadfastly followed, and indeed has emphasized time and time again, that Congress has ample power to protect interstate commerce from activities adversely and injuriously affecting it, *which but for this adverse effect on interstate commerce would be beyond the power of Congress to regulate.*

379 U.S. at 272 [emphasis added].

In determining whether the legislation in question is within the limits set out above, we examine: (1) whether Congress had a rational basis for finding that receipt or possession of a firearm by a convicted felon affects commerce, and (2) if it had such a basis, whether the means it selected to protect commerce are reasonable and appropriate. See, *Heart of Atlanta Motel, Inc.* v. *United States, supra* at 258-259; *White* v. *United States*, 399 F.2d 813, 823 (8th Cir. 1968).

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[2] See *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Blodgett* v. *Holden*, 275 U.S. 142 (1927); *United States* v. *Bass*, *supra*.

The Second Circuit in *United States* v. *Bass, supra,* found the statute so lacking in specific legislative history and findings as to make it impossible to say that Congress had a rational basis for finding that receipt or possession of a firearm by a convicted felon affects interstate commerce. We disagree.

It is clear that Congress relied to some extent on the Commerce Clause for authority in promulgating § 1202.[3] The introductory section to the statutory scheme, § 1201, states:

> The Congress hereby finds and declares that the receipt, possession or transportation of a firearm by felons * * * constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce, * * *

While no extensive debate or hearings were held in relation to the statute, we think it clear that Congress had before it sufficient data from which it could determine that the required nexus existed between interstate commerce and possession of a firearm by a convicted felon.[4] For example, *The Challenge of Crime in a Free Society,* a report by the President's Commission on Law Enforcement and Administration of Justice, published in February, 1967, estimated the economic cost of homicide at $750,000,000 per year; of robbery, burglary, larceny and auto theft at over $600,000,000 annually. Yearly private and public expenditures for crime prevention, detection and correc-

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[3] Since we find the necessary congressional authority under the Commerce Clause, we need not consider the other possible sources of power suggested by § 1201. See, *e.g.*, *United States* v. *Bass*, 308 F.Supp. 1386, 1387–1388 (S.D. N.Y. 1970).

[4] The fact that this material was considered by the 90th Congress is made clear by the general legislative history to the Omnibus Crime Control and Safe Streets Act of 1968. See, generally, 2 U.S.C.C.A.N. 1968, pp. 2112–2309.

tion were estimated to exceed $6,000,000,000. Without question, these appalling costs substantially burden interstate commerce. The Report went on to indicate that in 1965, 5,600 murders, 34,700 aggravated assaults and the vast majority of the 68,400 armed robberies were committed by means of firearms. It is self-evident that such widespread, firearm-related crime does have a substantial impact on interstate commerce. Finally, the Report indicates the special danger represented by a convicted felon:

> The most striking fact about offenders who have been convicted of the common serious crimes of violence and theft is how often many of them continue committing crimes.

The Challenge of Crime in a Free Society, supra at 45.

Data available subsequent to the passage of § 1202 reaffirm the nexus between interstate commerce and possession of a firearm by a felon. J. Edgar Hoover, in *Crime in the United States* (1969), indicates that nearly seventy-five percent of all persons arrested for robbery have prior criminal convictions. *Firearms and Violence in American Life* (1969), a staff report to the National Commission on the Causes and Prevention of Violence, states that "Robbery is a crime made infinitely more possible by having a gun." The same report indicates that an assault with a firearm is five times as likely to be fatal as one with a knife.

While these data may not be as precise or particular as might be desired, we find it impossible to say that Congress had no rational basis for finding that receipt or possession of a firearm by a convicted felon affects commerce.

Having found a rational nexus between the regulated activity and interstate commerce, we cannot say that the proscriptions of § 1202(a)(1) are unreason-

able or inappropriate means for eliminating the evil perceived by Congress. Again, our viewpoint must be relative rather than absolute; the exercise of congressional power need not coincide with what we believe to be the optimum choice of available alternatives. It need only be reasonable and appropriate. *Heart of Atlanta Motel, Inc.* v. *United States, supra; United States* v. *Perez,* 426 F2d 1073 (2nd Cir.), *cert. granted,* 39 L.W. 3214 (1970). Therefore, while licensing or registration systems or a more limited prohibition may also pass constitutional muster, we find it both reasonable and appropriate for Congress to prohibit convicted felons from possessing or receiving firearms.

It must be conceded that Congress' regulatory power under the Commerce Clause has been construed liberally and expanded to meet the needs of our increasingly complex society. *Maryland* v. *Wirtz,* 392 U.S. 183 (1968); *Katzenbach* v. *McClung, supra; Heart of Atlanta Motel, Inc.* v. *Uninted States, supra; Wickard* v. *Filburn, supra; United States* v. *Darby,* 312 U.S. (1941). Various Circuit Courts have recently upheld the constitutionality of statutes which prohibit, without requiring the prosecution to prove a connection with, interstate commerce, the use of extortionate means to collect or attempt to collect extensions of credit (18 U.S.C. §§ 891, 894), *United States* v. *Perez, supra;* and which generally prohibit the manufacture, processing, sale or possession of any depressant or stimulant drug (21 U.S.C. §§ 331(g), 360(a)), *United States* v. *Cerrito,* 413 F. 2d 1270 (7th Cir. 1969), *cert. denied,* 396 U.S. 1004 (1970); *White* v. *United States, supra; Dego* v. *United States,* 396 F. 2d 595 (9th Cir. 1968); *White* v. *United States,* 395 F. 2d 5 (1st Cir.), *cert. denied,* 393 U.S. 928 (1968). We do not think that a statute prohibiting the mere possession or receipt of firearms by convicted felons represents a sig-

nificant departure from established limits of congressional authority granted by the Commerce Clause.

Having determined that Congress does have the power to prohibit possession and receipt of firearms by convicted felons without a specific showing of relationship to interstate commerce, we must now decide whether 18 U.S.C. App. §1202(a)(1) is an exercise of that authority. The statute is not without ambiguity. Section 1201 sets out the congressional findings and declaration. It states that

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons * * * constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce * * *

and then continues to list further dangers posed by such receipt, possession or transportation.[5] Section 1202(a)(1) subjects any person "* * * convicted by a court of the United States or of a state or any political subdivision thereof of a felony * * *" and *"who receives, possesses, or transports in commerce or affecting commerce, * * * any firearm * * *"* to criminal penalties. (Emphasis added.) Finally, §1202(c)(1) defines "commerce" as used in this title as interstate commerce.

Defendants argue that the phrase "in commerce or affecting commerce" in §1202(a) modifies all the pre-

[5] In addition to burdening interstate commerce, §1201 finds the following adverse effects to flow from possession of firearms by felons:

"(2) a threat to the safety of the President of the United States and Vice President of the United States.

"(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

"(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

ceding words "receives, possesses or transports," thus making specific proof of activity affecting interstate commerce an element of any offense charged under §1202. The government on the other hand argues that only where the offense charged involves transporting firearms is it necessary to show that the act was "in commerce or affecting commerce." Both sides advance grammatical analyses supporting their positions. We find them equally unconvincing. See, *e.g.*, *United States* v. *Bass,* No. 34,640 (2nd Cir. Nov. 30, 1970); *United States* v. *Harbin,* 313 F.Supp. 50 (N.D. Ind. 1970); *United States* v. *Wiley,* 309 F.Supp. 141 (D. Minn. 1970); *United States* v. *Bass,* 308 F.Supp. 1385 (S.D. N.Y. 1970), *rev'd* No. 34,640 (2nd Cir. Nov. 30, 1970).

In our view, Congress did not intend proof that the receipt or possession charged under § 1202(a) occurred "in commerce or affecting commerce" to be an element of the offense. First, a close reading of the congressional findings and declarations expressed in § 1201 and the legislative history, albeit sketchy, leaves us strongly convinced that Congress was attempting to reach and prohibit all possession of firearms by felons. Section 1201 declares that the "* * * receipt, possession, or transportation of a firearm by felons * * * constitutes * * *" a burden on or threat to interstate commerce and several other areas within the proper sphere of congressional concern and legislation. The declaration seems to clearly indicate that possession, whether intrastate or interstate, affects interstate commerce. Further, it is unreasonable to suggest that the areas of congressional concern are any less threatened by intrastate possession than by interstate possession.

The legislative history reinforces our view. Sections 1201 to 1203 were introduced as an amendment to the Omnibus Crime Control and Safe Streets Act, by Sen-

ator Russell Long, and were finally passed as Title VII of that Act, Pub. L. No. 90–351, 82 Stat. 197. While other sections and amendments to the Act were the subject of extensive debate and discussion, Title VII passed uneventfully after an unexpected call for a vote. The history consists almost exclusively of explanatory comments by Senator Long. While the point considered here is not explicitly answered, we think a fair reading of the Senator's remarks compels our construction:

> * * * Congress simply finds that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.
>
> You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce.

114 Cong. Rec. 13,869 (1968).

> What the amendment seeks to do is to make it unlawful for a firearm—be it a handgun, a machinegun, a long-range rifle, or any kind of firearm—to be in the possession of a convicted felon who has not been pardoned and who has therefore lost his right to possess firearms. * * * It also relates to the transportation of firearms.
>
> * * * * *
>
> Clauses 1–5 [Clause 1 described convicted felons] describe persons who, by their actions, have demonstrated that they are dangerous, or that they may become dangerous. Stated simply, they may not be trusted to possess a firearm without becoming a threat to society. This title would apply both to hand guns and to long guns.
>
> * * * * *

> It has been said that Congress lacks the power to outlaw mere possession of weapons. * * *
>
> * * * * *
>
> Without question, the Federal Government does have power to control possession of weapons where such possession could become a threat to interstate commerce * * *.
>
> * * * * *
>
> The vast reach of the Federal power to control matters affecting interstate commerce, once thought to be beyond Federal legislation, has been demonstrated by the broad swath of the Civil Rights Act of 1964 and by the still broader scope of the 1968 civil rights legislation. No one can argue that Martin Luther King's murder did not affect commerce. Look at our cities and how stores and business(sic) engaged in interstate commerce were burned, looted and pillaged by rioting mobs protesting his death.

114 Cong. Rec. 14,773–14,775.

The use of the commerce language in these statements clearly goes to *why* Congress can prohibit all possession of firearms by felons, not to the *type* of possession prohibited.

Secondly, we view the existence of 18 U.S.C. § 922(g), (h) as corroborating our construction of § 1202. Sub-sections 922(g) and (h), essentially a reenactment of earlier legislation,[6] prohibit the receipt from or transportation in interstate or foreign commerce any firearm by convicted felons and other enumerated categories of individuals. Section 922 was enacted as part of Title IV of the Omnibus Crime

[6] See, 15 U.S.C. § 902(e), (f), Pub. L. 87–342, § 2, 75 Stat. 757.

Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197, the same act which contains § 1202 in Title VII. Moreover, Title IV was part of the original bill while Title VII was a last minute amendment. Unless § 1202 is construed to prohibit mere possession of firearms by felons, it would appear that Congress amended the Omnibus Crime Control and Safe Streets Act with provisions which did little more than duplicate an existing portion of the Act. We cannot subscribe such an intent to Congress.[7]

We find, therefore, that the elements of an offense under § 1202(a)(1) are (1) the knowing and willing (2) possession of a firearm (3) by a previously convicted felon.

Having determined that § 1202(a)(1) prohibits the possession of firearms by felons without proof that the possession was in or affecting commerce and that so interpreted, it is a valid exercise of congressional authority under the Commerce Clause, we are now faced with a number of other constitutional challenges to the statute.

It is argued that the classification of "felons" and "firearms" are both so arbitrary and unreasonable as to violate equal protection standards.

It is clear that the basic concepts of equal protection apply to the federal government through the Due Process Clause of the Fifth Amendment. See, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The safeguards of the equal protection doctrine vary in degree depending on the na-

[7] We are aware that the coverage of § 922 and § 1202(a) differ in some respects. However, we consider these differences insignificant in light of the overall similarity of coverage. We find the difference in the basis for the statutory ban on firearms—possession as opposed to receipt or transfer in interstate commerce—a much more rational and satisfying reason for the enactment of the separate provisions.

ture of the right being affected by the legislation.[8] In our view, legislation restricting the possession of firearms "* * * will not be set aside if any state of facts reasonably may be conceived to justify it."[9] See, *e.g., United States* v. *Wiley, supra*; *United States* v. *DePugh*, 266 F.Supp. 453 (W.D. Mo. 1967), *aff'd*, 393 F.2d 367 (8th Cir.), *cert. denied*, 393 U.S. 832 (1968). *Cf., United States* v. *Thoresen*, 428 F. 2d 654 (9th Cir. 1970).

Judged by these standards, we think that the attacks on the classifications of "felons" and "firearms" fall short. While meritorious arguments can be advanced justifying narrower classifications, we view these as policy considerations which do not alter the fact that the classifications chosen have a rational basis. Our determination that the Commerce Clause authorizes § 1202(a)(1) as we have construed it in large measure compels the conclusion that the statutory classifications have a rational basis. Furthermore, the fact that Congress has provided, in 18 U.S.C. § 925(c), that a person may obtain relief from § 1202(a)(1), under some circumstances,[10] is an addi-

[8] Compare, *e.g., Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Sherbert* v. *Verner*, 374 U.S. 398 (1963), with *Levy* v. *Louisiana*, 391 U.S. 68 (1968); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

[9] In so doing, we decide only that the right to bear arms is not the type of fundamental right to which the "compelling state interest" standard attaches. *Cf., Shapiro* v. *Thompson*, *supra* at 658–663 (dissenting opinion by Harlan, J.); *United States* v. *Thoresen*, 428 F.2d 654 (9th Cir. 1970).

[10] 18 U.S.C. § 925(c) states in pertinent part:

"A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabili-

tional reason for finding the "felons" classification to be a reasonable one. *Cf., United States* v. *Thoresen, supra.*

Section 1202(a)(1) is also attacked on the basis that it creates a presumption that the particular possession is in or has an effect on interstate commerce, and that this presumption is unconstitutional under the teachings of *Leary* v. *United States,* 395 U.S. 6 (1969), and *Tot* v. *United States,* 319 U.S. 463 (1943). See also, *United States* v. *Romano,* 382 U.S. 136 (1965); *United States* v. *Gainey,* 380 U.S. 63 (1965).

The fallacy in this argument is that it assumes that a connection between possession and interstate commerce is an element of a § 1202(a)(1) offense. In the cases relied upon by the defendants, the presumption attacked provided the fact finder with a necessary element of the offense and could, at least theoretically, be overcome by the defendant. For example, in *Tot* v. *United States, supra,* the defendant was charged with violating a statute which prohibited certain felons from receiving a firearm *which had been transported in interstate commerce.* The statutory presumption found wanting stated that possession of a firearm was prima facie evidence that the defendant had received the firearm after it had been transported in interstate commerce.

However, under § 1202(a)(1), as we have interpreted it, the fact that the possession was in or affect-

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ties imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. * * *"

ing commerce is not an element of the offense to be proven. It follows that the rationale of *Tot* and *Leary* is inapplicable. See also, *United States* v. *Thoresen, supra* at 661.

We have already upheld the congressional finding that, in general, possession of a firearm by felons affects interstate commerce. This being so, Congress may prohibit the particular intrastate possession "* * * even though in that instance the effect on interstate commerce is minimal or nonexistent." *United States* v. *Perez, supra* at 1078.

The next contention raised is that § 1202(a)(1) violates the Second Amendment right to bear arms. We do not agree. The leading pronouncement of the Supreme Court in this area states:

> In the absence of any evidence tending to show that possession or use of * * * [the weapon] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say the Second Amendment guarantees the right to keep and bear such an instrument.

United States v. *Miller*, 307 U.S. 174, 178 (1939).

While the Court in *Miller* dealt with the prohibited possession of a sawed-off shotgun, the reasoning and conclusion of that case has carried forward to other federal gun legislation. *Cases* v. *United States*, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied sub nom., Valasquez* v. *United States*, 319 U.S. 770 (1943); *United States* v. *Tot*, 131 F.2d 261, 266 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); *United States* v. *Wiley, supra*. We think it is also applicable here. Although § 1202(a) is the broadest federal gun legislation to date, we see no conflict between it and the Second Amendment since there is no showing that prohibiting possession of firearms by felons obstructs the maintenance of a "well regulated

militia." See, *United States* v. *Wiley, supra* at 144–145.

Finally, it is alleged that § 1202(a)(1) is invalid as an ex post facto law. We think that the decision in *Cases* v. *United States, supra* at 920–921, adequately disposes of this argument.

Lastly, the defendant herein argues that even if his conviction would otherwise be valid under § 1202(a)(1), his earlier conviction under the City of Minneapolis Gun Ordinance bars this prosecution under the double jeopardy provision of the Fifth Amendment.[11] It is conceded by the government that the defendant's violation of the city ordinance resulted from the same conduct involved here and that the elements of proof in the two cases are identical.[12]

However, the government contends, and we agree, that the defense of double jeopardy does not bar successive prosecutions where, as here, there is no identity of sovereigns. We believe the decision of the Supreme Court in *United States* v. *Lanza,* 260 U.S.

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[11] Counsel for the defendant suggested in oral argument, that the government abused its discretion in prosecuting this defendant for this offense in light of an alleged policy of the Justice Department against federal prosecutions in § 1201(a) cases in which a person had been previously convicted by a state court for the same offense. We do not find adequate support in this record to justify setting aside the conviction for an abuse of prosecutorial discretion. See, K. Davis, *Discretionary Justice, A Preliminary Inquiry* (1969).

[12] Minneapolis Code of Ordinances, § 877.020, reads as follows:

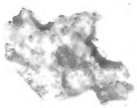
"Persons Prohibited. It shall be unlawful for any person within the corporate limits of the City of Minneapolis to own, possess, carry, or have in his custody or control any firearms or ammunition unless such person: * * * (2) Shall not within the previous five years have been: (a) Convicted of a felony or drug addiction under the laws of this State or any other jurisdiction; * * *"

377 (1922), specifically reaffirmed by *Abbate* v. *United States,* 359 U.S. 187 (1959), compels this result. See also, *Bartkus* v. *Illinois,* 359 U.S. 121 (1959); *United States* v. *Fineburg,* 383 F.2d 60 (2nd Cir. 1967).

The defendant suggests that *Waller* v. *Florida,* 25 L.Ed. 2d 435 (1970), indicates a rejection, or at least a weakening, of the "dual sovereign" concept. We doubt that it does. *Waller* decided only that successive municipal and state prosecutions were barred where the elements of the offense were identical. The Court reasoned that Florida municipalities were subdivisions of the State and not independent sovereigns.

Finding § 1202(a)(1) constitutional and the prosecution properly brought, the conviction is

Affirmed.



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OCTOBER TERM, 1970

No. 1285

UNITED STATES OF AMERICA, PETITIONER

v.

DENNETH BASS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 60–67) is reported at 434 F. 2d 1296. The opinion of the district court (App. 55–59) is reported at 308 F. Supp. 1385.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to January 29, 1971. The petition was filed on that date and was granted on March 29, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. App. (Supp. V) 1202(a) should be construed to prohibit any possession of a

firearm by a felon, without the necessity of proof that the possession was "in commerce or affecting commerce".

2. Whether, if so construed, the statute is constitutional as a valid exercise of congressional power under the Commerce Clause.

STATUTES INVOLVED

18 U.S.C. App. (Supp. V) 1201 provides:

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

18 U.S.C. App. (Supp. V) 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any po-

> litical subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. (Supp. V) 1202(c) provides in pertinent part:

> As used in this title—
>
> (1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country;
>
> (2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less * * *.

STATEMENT

1. Respondent was indicted in the United States District Court for the Southern District of New York on two counts charging him, as a previously convicted felon, with possession of firearms, in violation of 18 U.S.C. App. (Supp. V) 1202(a)(1). A third count charged him with carrying a firearm during the commission of a felony (the sale of a narcotic drug), in

violation of 18 U.S.C. (Supp. V) 924(c)(2). After a jury trial, respondent was convicted on the two counts alleging violation of Section 1202(a)(1), but acquitted on the third count. On February 19, 1970, he was sentenced to concurrent prison terms of fifteen months.

The evidence showed that on July 28, 1969, United States Treasury Agent Jordan, acting in an undercover capacity, went to respondent's home in the Bronx to purchase narcotics. Respondent directed Jordan to the basement where Jordan purchased narcotics from an unknown individual (App. 7–8). The following day Jordan returned to respondent's home and was admitted by respondent, who was holding a Baretta automatic pistol in his hand. Jordan purchased seven bags of heroin from respondent and left the premises (App. 8–10, 16, 18).

On July 30, 1969, Agent Jordan filed an affidavit with a United States Commissioner and obtained an arrest warrant for respondent and a search warrant for his apartment (see App. 14). Thereafter Jordan went to respondent's apartment accompanied by other agents. Jordan appeared at the front door alone and was let in by respondent, who took Jordan into the bedroom where the agent observed a sawed-off shotgun on a night table. At about this time, the other agents knocked at the door and announced themselves. Jordan opened the front door as respondent sought to flee out the rear exit, where he was apprehended by a waiting agent (App. 15, 27–28). A search pursuant to the warrant produced the shotgun, as well as the Baretta, which was under a bathtub (App. 23–24). The next day, after being warned of his rights, re-

spondent stated that he had recently purchased both firearms (App. 24–25).

It was stipulated at trial that on or about February 1, 1968, respondent had been convicted in the New York State Supreme Court of the felony of attempted grand larceny in the second degree, described in counts 1 and 2 of the indictment (App. 25–26). In his testimony, respondent admitted that the weapons found in his apartment belonged to him (App. 38).[1]

2. The indictment contained no allegation, nor was any proof introduced to show, that the firearms possessed by respondent had been "in commerce or affecting commerce".[2] Following his conviction, respondent moved to arrest the judgment on the ground that such an allegation was an essential element of the crime under 18 U.S.C. App. (Supp. V) 1202(a)(1). The district court denied the motion, holding that the statutory phrase "in commerce or affecting commerce" modifies only the adjacent term "transports" and not the preceding terms "receives" and "possesses." The court found this interpretation of the statute supported by its legislative history and the formal congressional findings expressed in Section 1201. Finally, the district court held that the statute as so construed was constitutional (App. 55–59).

[1] Respondent interposed no factual defense to the charges under Section 1202(a)(1). His defense at trial was directed to the count 3 charge under 18 U.S.C. (Supp. V) 924(c)(2) (which carries a mandatory minimum sentence of five to twenty-five years), on which he was acquitted.

[2] 18 U.S.C. App. (Supp. V) 1202(c)(1) defines "commerce" to mean interstate or foreign commerce.

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The court of appeals reversed, ruling that, notwithstanding the grammatical context of the commerce phrase and the statute's legislative history, Section 1202(a)(1) should be construed to require an allegation and proof that the felon's possession had an effect on interstate commerce. The court reasoned that it would have been illogical for Congress to condition a transportation charge on the showing of a connection with commerce while exempting possession and receipt charges from the same showing—particularly since, in its view, transportation would necessarily involve receipt or possession. The court was also of the view that substantial constitutional doubts concerning the power of Congress to enact the statute would exist if the government's construction were accepted (App. 60–67).

SUMMARY OF ARGUMENT

A

Both the language and legislative history of 18 U.S.C. App. (Supp. V) 1202(a)(1)—punishing any convicted felon who "receives, possesses, or transports in commerce or affecting commerce" any firearm—suggest that Congress intended to prohibit convicted felons from possessing firearms without requiring proof in any individual case that the possession was "in commerce or affecting commerce." While the grammatical construction of the statute which we suggest is obviously not dispositive, the specific finding in the statute that possession of firearms by convicted felons constitutes a burden on interstate commerce and the remarks of the statute's sponsor, Senator

Long, on the floor of the Senate make clear that all possessions of firearms by convicted felons were intended to be banned.

The court of appeals rejected the construction, noting that it would be illogical for Congress to punish *all* receipts and possessions of firearms by the designated persons, but only those transportations which were in or affected commerce. While it may be difficult to rationalize the differing treatments of the offenses by Congress, an analysis of the federal gun control legislation existing at the time of the statute's consideration by Congress and of Title IV of the same legislation of which Section 1202(a)(1) was a part (as Title VII) shows that under the court of appeals' construction, Senator Long's statute would be almost totally redundant. The legislative history shows that Congress was well aware of the other gun control legislation and intended Section 1202(a)(1) to be a useful complement to it.

B

Any doubts about Congress' power under the Commerce Clause to enact Section 1202(a)(1) as construed by the government have been largely resolved by this Court's decision in *Perez* v. *United States*, No. 600, 1970 Term, decided April 26, 1971. Thus, it is clear that Congress has the power to prohibit a *class* of activities which affect interstate commerce, notwithstanding the fact that isolated instances within the class may have no provable effect on such commerce. Reference to the reports and statistics before Congress at the time it considered the instant statute

shows that Congress has a rational basis for concluding that possessions of firearms by convicted felons as a class constitutes a burden on interstate commerce.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 1202(a)(1) ESTABLISH THAT CONGRESS INTENDED TO PROHIBIT FELONS FROM POSSESSING FIREARMS WITHOUT REQUIRING PROOF IN ANY INDIVIDUAL CASE THAT THE POSSESSION WAS "IN COMMERCE OR AFFECTING COMMERCE"

The statute here at issue, 18 U.S.C. App. (Supp. V) 1202(a)(1), punishes any convicted felon who

> * * * receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm * * *.

The question is whether, in any particular case, the prosecution must show that possession or receipt of the firearm is "in commerce or affecting commerce." In our view, both the language and the legislative history of the statute support the construction that the government need not establish a connection with interstate commerce in each case. Our position both on construction and on the validity of the statute as so construed (which is argued in Point II, below) has been upheld by every court of appeals other than the court below that has considered the question—a total of four circuits. *United States* v. *Cabbler,* 429 F. 2d 577 (C.A. 4), certiorari denied, 400 U.S. 901; *United States* v. *Mullins,* No. 15101 (C.A. 4), decided November 3, 1970, pending on petition for a writ of certiorari, No. 6166, 1970 Term; *Stevens* v. *United States,* No. 20,488

(C.A. 6), denied March 22, 1971; *United States* v. *Synnes,* 438 F.2d 764 (C.A. 8); *United States* v. *Daniels,* 431 F.2d 697 (C.A. 9); *United States* v. *Crow,* No. 25,850 (C.A. 9), decided March 24, 1971.

Turning to the language of the statute, the punctuation suggests that the phrase "in commerce or affecting commerce" modifies only the verb "transports" and not "receives" or "possesses." As noted by the Sixth Circuit in *Stevens, supra,* the contrary meaning urged by respondent would be supported only if there were a comma following the word "transports" thus indicating an intent that the succeeding phrase modify all of the preceding verbs. As the *Stevens* court stated (slip op. at 3):

> * * * The absence of a comma after the word "transports" becomes more significant in light of the draftmen's use of a comma immediately prior to the phrase "after the date of enactment of this Act" to indicate that this phrase was intended to modify each of the three words "receives," "possesses," and "transports."

While punctuation alone is not dispositive of the issue here, the same construction is supported by the express finding of Congress, set forth in Section 1201, *supra,* p. 2, that "the receipt, possession or transportation of a firearm by felons" constitutes "a burden on commerce or threat affecting the free flow of commerce." This finding would have been wholly unnecessary and without practical effect if Congress had intended to require proof under Section 1202 (a)(1) that each receipt or possession of a firearm by a felon was in or affected interstate or foreign com-

merce. The logical explanation for the incorporation of the finding into the statute is that Congress was seeking to establish a basis for prohibiting any receipt or possession of firearms by felons, not just specifically those "in or affecting commerce." Similarly, the further findings that the receipt, possession or transportation of a firearm by a felon endangers the safety of the President and Vice President, the First Amendment rights of free speech and religion, and the continued and effective operation of the governments of the States and of the United States reflect an intent to prohibit all receipts and possessions of firearms by felons.[3]

Reference to the legislative history of the statute leaves little doubt that the construction suggested by the wording of Section 1202(a)(1) and supported by the findings contained in Section 1201 is the correct one. The present statute, 18 U.S.C. App. (Supp. V) 1201–1203, was enacted as Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90–351). Title VII was introduced by Senator Long on the floor of the Senate on May 17, 1968, and was agreed to by the Senate by a voice vote on May 23 without having been referred to any committee.[4] 114

[3] The findings contained in Section 1201 do not differentiate between receipt, possession and transportation and thus offer no explanation why the words "in commerce or affecting commerce" were inserted after the word "transports" in Section 1202(a)(1). See discussion at pages 14–17, *infra*.

[4] Title VII was introduced as an amendment to S. 917. 114 Cong. Rec. 13,867. After the amendment passed, the Senate voted to amend H.R. 5037, a crime bill previously enacted by the House of Representatives, by deleting the House language and substituting the text of S. 917. 114 Cong. Rec. 14,798. As

Cong. Rec. 14,775. Accordingly, there were no legislative hearings and no committee report with respect to the statute; the entire legislative history is contained in a few pages of the Congressional Record and consists primarily of an explanation of the statute by its sponsor, Senator Long.[5] Senator Long made it quite clear on more than one occasion what his proposed legislation was meant to accomplish. In introducing his amendment, he commented (114 Cong. Rec. 13,868–13,869):

> I have prepared an amendment which I will offer at any appropriate time, simply setting forth the fact that anybody who has been convicted of a felony * * * is not permitted to possess a firearm * * *.
>
> It might be well to analyze, for a moment, the logic involved. When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them.
>
> * * * * *
>
> So Congress simply finds that the possession of these weapons by the wrong kind of people

amended, H.R. 5037 was returned to the House and approved on June 6, 1968 without further committee study. 114 Cong. Rec. 16,300. The legislation, entitled the Omnibus Crime Control and Safe Streets Act of 1968, was signed into law by the President on June 19, 1968.

[5] The entire legislative history of the sections involved is set forth as an appendix to the majority's opinion in the *Stevens* case, *supra*.

> is either a burden on commerce or a threat that affects the free flow of commerce.
>
> You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you would like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce.[6]

Thus, mere possession by a convicted felon was to be prohibited, Congress having determined that such possession placed a burden on interstate commerce. This intended effect of the legislation is further reflected by a colloquy between Senators Long and McClellan just prior to the amendment's passage (114 Cong. Rec. 14,774–14,775):

> Mr. McClellan. I have not had an opportunity to study the amendment. * * * The thought occurred to me, as the Senator explained it, is that if a man had been in the penitentiary, had been a felon, and had been pardoned, without any condition in his pardon to which the able Senator referred, granting him the right to bear arms, could that man own a shotgun for purposes of hunting?
>
> Mr. Long of Louisiana. No, he could not. He could own it, but he could not possess it.

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[6] Senator Long also referred to the need to protect the life of the President and the Vice President and the need to protect citizens in the exercise of their First Amendment right to free speech—referring specifically to Rev. Martin Luther King, who had been assassinated some two months before—as bases for congressional power to outlaw possession of weapons by certain persons. 114 Cong. Rec. 13,869.

> Mr. McClellan. I beg the Senator's pardon?
>
> Mr. Long of Louisiana. This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.
>
> Mr. McClellan. Could he have it in his home?
>
> Mr. Long of Louisiana. No, he could not.

Summing up just before the voice vote on the amendment, Senator Long noted (114 Cong. Rec. 14,775):

> This amendment would proceed on the theory that every burglar, thief, assassin, and murderer is entitled to carry a gun until the commission of his first felony; but, having done that, he is then subject to being denied the right to use those weapons again.

Finally, on June 6, 1968, shortly before the House voted overwhelmingly in favor of H.R. 5037, as amended by the Senate, Congressman Machen explained Title VII as follows (114 Cong. Rec. 16,286):

> Title VII prohibits the unlawful possession or receipt of firearms by felons, veterans who have been other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship. I believe this provision is necessary to a coordinated attack on crime and also a good complement to the gun-control legislation contained in title IV of this bill.

It seems clear from the foregoing that, as the courts of appeals in other circuits have held, Congress intended in enacting Section 1202(a)(1) to reach any possession of firearms by a convicted felon whether or

not it was specifically "in commerce or affecting commerce."[7]

To be sure, it is not clear why the "transportation" offense was qualified by the interstate commerce requirement in Section 1202(a)(1) that does not apply to "receipt" or "possession". It was for this reason that the court below found that the government's construction of the statute led to an "illogical conclusion." In the words of the court (App. 63):

> * * * Interpreting the commerce requirement to modify only the "transports" clause means that, although intrastate receipt and possession are punishable under the statute, intrastate transportation is not. Moreover if both "receipt" and 'possession" are punishable without regard to the interstate elements, the modifying clause is meaningless, since there can scarcely be "transportation," whether intrastate or interstate, without an accompanying receipt or possession. * * *

It does not necessarily follow, however, that one must possess a firearm to "transport" it within the meanings of Section 1202(a)(1); an argument can be

[7] Only Congressman Pollock appears possibly to have construed the Act otherwise, stating that (114 Cong. Rec. 16,298): "This section makes it a Federal crime to take, possess, or receive a firearm across State lines when the person involved: First, has been convicted of a crime punishable by imprisonment for a term exceeding 1 year; * * *. The overall thrust is to prohibit possession of firearms by criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner. I agree with this provision and feel this title alone provides the gun legislation portion necessary under this bill, without need for enactment of title IV." The latter part of this statement is, however, consistent with the rest of the legislative history.

made that the transportation prohibition of that section includes a prohibition against causing a firearm to be transported—an act that can be effected without receiving or possessing the firearm.[8] Congress might have felt that the broader scope of the term "transports," as compared to the terms "receives" or "possesses," justified its qualification by the interstate commerce requirement.

But even if no clear rationale can be discovered for the special qualification of the transportation offense, it does not follow that the construction of Section 1202(a)(1) given by the court below should be accepted. By concentrating on what it found to be the weakness of the government's construction of the statute, the court failed to perceive that its own construction suffered from a more serious defect in that it did not take into account the provisions of Title IV of the very same act of which the present statute was a part. Senator Long in the Senate, in response to a question by the sponsor of Title IV, Senator Dodd (114 Cong. Rec. 14,774), and Congressman Machen in the House (*supra,* p. 13) both indicated that Title VII was intended to complement Title IV and was in no way

[8] Compare former 15 U.S.C. 902(e) (making it a crime for certain persons to "ship, transport, or cause to be shipped or transported" any firearm in interstate commerce) with its 1968 replacement, 18 U.S.C. (Supp. V) 922(g) (making it a crime for certain persons to "ship or transport" any firearm in interstate commerce). The Senate committee report on the 1968 legislation stated that what in substance was to become Section 922(g)—then designated as Section 922(e) in the reported bill—followed 15 U.S.C. 902(e), thus suggesting that Congress found the "cause to be shipped or transported" language of the earlier statute surplusage. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 115

introduced as a substitute for that part of the 1968 Omnibus Crime Act.

Since 1961, it has been a federal crime for any convicted felon to "receive any firearm * * * which has been shipped or transported in interstate or foreign commerce" or to ship, transport or cause to be shipped or transported any firearm. 15 U.S.C. 902(e), (f).[9] These statutes were repealed and recodified in somewhat expanded form in Title IV of the 1968 Act and are now found in 18 U.S.C. (Supp. V) 922(g), (h).[10] These recodified sections make it a crime for a convicted felon[11] "to ship or transport any firearm * * * in interstate or foreign commerce" or to receive any firearm which has been so shipped or transported. Since receipt (and hence possession) of a firearm "in interstate or foreign commerce" has thus been, both prior to and after 1968, a crime punishable by imprisonment for up to five years, the construction of Section 1202(a)(1) by the court below to require an

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[9] This statute was passed originally in 1938 limited to persons convicted of a crime of violence. See *United States* v. *Thoresen*, 428 F. 2d 654 (C.A. 9); *Reddy* v. *United States*, 403 F. 2d 26 (C.A. 1), certiorari denied, 393 U.S. 1085; *DePugh* v. *United States*, 393 F. 2d 367 (C.A. 8), certiorari denied, 393 U.S. 832.

[10] Title IV expanded the class of persons proscribed from interstate transactions in firearms to include narcotic, marihuana or other drug users and addicts, as well as adjudicated mental defectives or persons committed to a mental institution. Both former 15 U.S.C. 902(e) and (f) and their present counterparts also apply to anyone who is a fugitive from justice.

[11] In fact neither former 15 U.S.C. 902(e), (f) nor their present counterparts use the term "felon." All these statutes refer to a person convicted of a "crime punishable by imprisonment for a term exceeding one year." With only minor exceptions, the definition of "felony" in Section 1202 is identical. See Section 1202(c)(2), set forth *infra*, p. 3.

allegation and proof that the possession or receipt of a firearm by a felon was "in commerce or affecting commerce" relegates that statute to virtual redundancy. Of course under our proposed construction, the transportation prohibition of Section 1202(a)(1) would still be redundant—unless the commerce requirement were read out of the statute.[12] But, given the choice between interpreting the statute to make the entire section superfluous and interpreting it to leave a possible question of consistency as to only one clause, we submit that the latter construction is more rational; since the proscription of felons from possessing or receiving firearms contained in Section 1202(a)(1) is clearly the core provision of Title VII, Senator Long, the bill's sponsor, obviously would not have viewed his amendment as a significant addition to Title IV if it covered only the same ground as Title IV. For the foregoing reasons, we submit that the intent of Congress in Section 1202(a)(1) was, as the district court in this case concluded, to punish any possession or receipt of firearms by a convicted felon, without the need to allege or prove that the possession or receipt was in or affected interstate commerce.[13]

[12] This indeed was the construction given to the statute by one district court. *United States* v. *Davis*, 314 F. Supp. 1161, 1165–1167 (N.D. Miss.).

[13] Several Senators in questioning then Attorney General Ramsey Clark with regard to a proposal for further gun legislation shortly after the passage of Title VII, indicated their understanding that Title VII prohibited all possession of firearms by convicted felons. See *Hearings Before the Senate Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, 90th Cong., 2d Sess., pp. 69–70, 623–624 (June 26 and July 9, 1968).

II. CONGRESS IS AUTHORIZED UNDER THE COMMERCE CLAUSE TO PROHIBIT GENERALLY THE POSSESSION OF FIREARMS BY CONVICTED FELONS

Apart from the asserted incongruity of interpreting the "possesses" and "receives" branches of Section 1202(a)(1) differently from the "transports" aspect, the court of appeals based its construction of the statute principally upon its view that it was necessary to "avoid a reading which would create serious constitutional doubts" (App. 65).[14] But whatever doubts may have existed at the time of the decision below about the constitutionality of punishing possession, without tying it to commerce specifically, have been largely resolved by this Court's decision in *Perez* v. *United States,* No. 600, 1970 Term, decided April 26, 1971. That decision sustained the provisions of Title II of the Consumer Credit Protection Act, 18 U.S.C. (Supp. V) 891–894, 896, which punish extortionate credit transactions without requiring proof that a particular defendant's activities affect interstate commerce. Accordingly, we submit that Congress has the power under the Commerce Clause to prohibit activities which as a class affect interstate commerce

[14] Since the court below held only that a substantial constitutional question would be raised in the event the government's construction of the statute were adopted, it would not be strictly necessary for this Court to rule on the statute's validity to reverse the judgment. In view, however, of the fact that the issues of construction and constitutionality are intertwined, we urge the Court to reach the constitutional question rather than remand the issue to the court below. Every other court of appeals which has interpreted the statute in the manner we suggest has gone on to uphold its constitutionality under the Commerce Clause. See the cases cited *infra*, pp. 8–9.

without proof in individual cases that a specific act in itself affects interstate commerce; we shall also show that Congress had a rational basis for concluding that possession of firearms by convicted felons constitutes a burden on interstate commerce.

As *Perez,* slip op. at 5–6, and earlier decisions of this court make clear, the power of Congress to legislate with respect to activities affecting interstate commerce—in both regulatory and criminal statutes—encompasses the power to reach wholly intrastate activities. See *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119; *Wickard* v. *Filburn,* 317 U.S. 111, 125; *Katzenbach* v. *McClung,* 379 U.S. 294; *Maryland* v. *Wirtz,* 392 U.S. 183. And pursuant to this power, Congress may regulate an entire class of intrastate activities if it determines that the class as a whole affects interstate commerce. See *United States* v. *Darby,* 312 U.S. 100, 120–121; *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241; *Maryland* v. *Wirtz,* 392 U.S. at 192–193; *Perez, supra,* slip op. at 6–9. Finally,

> [w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class. *Maryland* v. *Wirtz,* 392 U.S. 183, 193 [*Perez, supra,* slip op. at 9].

Under these principles, if Congress' determination that the possession of firearms by convicted felons in general affects interstate commerce is valid, then it follows that Congress had the power to prohibit *all* possessions of firearms by convicted felons without

requiring proof that each individual possession affects interstate commerce. The only remaining question, therefore, is whether Congress was justified in concluding that the possession of firearms by the designated persons constitutes a burden on interstate commerce. If that conclusion had a "rational basis" on "any state of facts either known or which could reasonably be assumed" by Congress, then the statute must be upheld. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154; *Katzenbach* v. *McClung, supra,* 379 U.S. at 303–304; *Maryland* v. *Wirtz, supra,* 392 U.S. at 189–190, n. 13.

It is not difficult to perceive a rational basis for Congress' finding in 18 U.S.C. App. (Supp. V) 1201 that firearms in the possession of convicted felons pose a threat to interstate commerce.[15] Although, as with the statutes at issue in *Perez,* no hearings were held on the instant gun control legislation and no committee reports accompanied it, Congress did have statistics on the sharp rate of increase of serious crimes during the 1960's, the high rate of recidivism among convicted felons and the number of serious crimes committed with the use of firearms.

[15] One court of appeals, in upholding the constitutionality of Section 1202(a)(1) as construed by the government, commented that no citations of authorities and statistics are necessary to support the proposition that possesssion of firearms by convicted felons adversely affects interstate commerce. *Stevens* v. *United States, supra,* p. 8, slip op. at 13. We agree that the matter is appropriate for judicial notice and submit that the legislation would be equally valid even had Congress made no findings. Cf. *Perez, supra,* slip op. at 11. But we need not rest our case there, however, for it is apparent that the legislative findings that were made had a solid foundation in empirical data before Congress.

In February 1967, for example, the President's Commission on Law Enforcement and the Administration of Justice published its report entitled *The Challenge of Crime in a Free Society*. The report cited the "very heavy economic burden upon both the community as a whole and individual members of it" imposed by crime (*id.* at 32) and estimated the yearly economic cost of homicide at $750,000,000 and of robbery, burglary, larceny and auto theft at $600,000,000. The report also noted that "[c]riminal acts causing property destruction or injury to persons not only result in serious losses to the victims or their families but also the withdrawal of wealth or productive capacity from the economy as a whole" (*id.* at 34). A chapter of the report was devoted to a discussion of the need for more effective gun control legislation, it being noted that the existing Federal Firearms Act of 1938 applied only to direct interstate shipments and did not prevent convicted felons from buying firearms locally after they had been transported from another state (*id.* at 240). The significance of firearms was underscored by a citation of statistics showing that in 1965, 5,600 murders, 34,700 aggravated assaults and the vast majority of 68,400 armed robberies were committed by means of firearms (*id.* at 239). And all but 10 of the 278 law enforcement officers murdered from 1960 through 1965 were killed with firearms (*ibid.*). Finally, the report noted the high rate of recidivism among those convicted of "the common serious crimes of violence and theft" (*id.* at 45).

That the members of the 90th Congress were well aware of the Crime Commission's report is clear. Dur-

ing 1967, extensive hearings were held on anti-crime bills, including proposed gun control legislation, and frequent references were made to the Commission's report as well as to other reports and statistics. See *Hearings Before House Subcommittee No. 5 of the Committee on the Judiciary on H.R. 5037, H.R. 5038, H.R. 5384, H.R. 5385 and H.R. 5386,* 90th Cong., 1st Sess., pp. 213, 241, 261 (testimony and statement of former Attorney General Ramsey Clark); 487–488 (table submitted by Congressman Casey showing percentage of serious crimes committed with firearms); 495 (testimony of James V. Bennett, President, National Council for a Responsible Firearms Policy). The Crime Commission's report was also considered by the Senate Judiciary Committee in connection with S. 917, the bill which was substituted for H.R. 5037 and was eventually enacted as the Omnibus Crime Control and Safe Streets Act of 1968 (see pp. 10–11, n. 4, *supra*). S. Rep. No. 1097, 90th Cong., 2d Sess. p. 31. The committee report on S. 917 cited, in a discussion of Title IV of the bill (relating to firearms shipped interstate), further statistics on the use of firearms in the commission of serious crimes, indicating significant increases in 1966 and 1967 over the 1965 figures reflected in the Crime Commission's report. *Id.* at 76. Further statistics and reports on firearms were cited in the additional views of Senator Tydings on Title IV, which accompanied the committee report. *Id.* at 190, 193–195, 203–304.

Thus, when Senator Long offered his amendment to S. 917 on May 17, 1968, he was not asking his colleagues to take on faith the amendment's proposed

finding that possession of firearms by convicted felons constituted a burden on interstate commerce; he was asking for action based on a solid record of criminal statistics which had been before Congress for over one year. Under these circumstances, Congress, in enacting 18 U.S.C. App. (Supp. V) 1202(a)(1), had a "rational basis" for concluding that convicted felons as a class should be prohibited from receiving or possessing firearms.

We submit, therefore, that Section 1202(a)(1) is not rendered constitutionally suspect by the interpretation that all possessions of firearms by convicted felons are proscribed, and that there is thus no constitutional reason to approve the restrictive construction adopted by the court below. As we have shown in Part I, the clear intent of Congress was to ban all possessions and the statute should be applied so as to implement that intent.[16]

---

[16] The court of appeals noted (App. 67) that, because of the result it had reached, it had no occasion to discuss respondent's contention that the definition of the term "felony" in Section 1202(c)(2) denied him the equal protection of the laws. Presumably this refers to an argument that the proscription against the possession or receipt of firearms by convicted felons is unreasonable as applied to a person convicted of a non-violent crime. While this issue is not presented in this Court, we point out that every court of appeals that has considered it has held that Section 1202(a)(1) is not irrational as to a person convicted of a non-violent crime. *United States* v. *Synnes*, *supra*, 438 F. 2d at 771–772; *United States* v. *Karnes*, 437 F. 2d 284 (C.A. 9), pending on a petition for a writ of certiorari, No. 1545, this Term. The same result was uniformly reached as to the similar provisions of former 15 U.S.C. 902(e). See *Williams* v. *United States*, 426 F. 2d 253 (C.A. 9), certiorari denied, 400 U.S. 881; *United States* v. *Thoresen*, 428 F. 2d 654 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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JUNE 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

IN THE

Supreme Court of the United States

No. 70-71

UNITED STATES,
Petitioner,

v.

DENNETH BASS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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WASHINGTON, D.C. THIEL PRESS 202 393 0625

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (App. 60-67) is reported at 434 F.2d 1296. The opinion of the district court (App. 55-59) is reported at 308 F. Supp. 1385.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1970. Mr. Justice Harlan extended the government's time for filing a petition for a writ of certiorari to January 29, 1971. The petition was granted on March

29, 1971. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. App. (Supp. V) 1202(a) should be construed to prohibit any possession of a firearm by a felon, without the necessity of proof that the possession was "in commerce or affecting commerce."

2. Whether, if so construed, the statute is constitutional as a valid exercise of Congressional power under the Commerce Clause.

3. Whether the definition of "felony" contained in 18 U.S.C. App. (Supp. V) 1202(c)(2) is violative of due process and equal protection by defining predicate culpability according to State felony-misdemeanor classifications thereby permitting identical prior criminal acts to suffice as predicates in some cases, but not others, depending upon the manner of their classification by the respective States.*

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*As the Solicitor General points out (Pet. br., p. 23, n. 16), the court of appeals found it unnecessary to pass upon respondent's contention that the definition of "felony" in section 1202(c)(2) violated the equal protection clause. Because this Court may, in its discretion, either pass upon the issue or leave it for the consideration of the court below upon remand in the event of a reversal [e.g. *United States v. Spector*, 343 U.S. 169, 172 (1952)], we deem it advisable to brief the question as Point III of this brief.

We also respectfully call the Court's attention to the government's misconception of the argument presented to the court of appeals. The argument presented below was that by making predicate criminal conduct contingent upon state felony-misdemeanor distinctions, two persons committing identical prior criminal acts would be punishable under section 1202 solely on the basis of whether the State of conviction defined the act a felony or misdemeanor punishable by more than two years' imprisonment. No argument was made, as the government believes, that the statute's irrationality stemmed from a distinction between violent and non-violent prior crimes.

STATUTES INVOLVED

18 U.S.C. App. (Supp. V) 1201 provides:

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

18 U.S.C. App. (Supp. V) 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. (Supp. V) 1202(c) provides in pertinent part:

> As used in this title—
>
> (1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or ter-

ritory or possession and any State or the District of Columbia or between points in the same State but through any other State or the District of Columbia or a foreign country;

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less * * *.

STATEMENT

Respondent accepts the government's statement of the case.

SUMMARY OF ARGUMENT

A.

The language of 18 U.S.C. App. (Supp. V) 1202(a)(1) is ambiguous as to whether Congress intended to dispense with a requirement that receipt or possession of a firearm by a convicted felon be shown in an individual prosecution to have been "in commerce or affecting commerce." In the absence of edifying legislative history, the court of appeals' interpretation that Congress did not so intend is sounder than the broader interpretation urged by the government. Since section 1202(a)(1) specifically provides that transportation of a firearm by a prior felon be "in commerce or affecting commerce," the court of appeals appropriately reasoned that "in commerce or affecting commerce" was also meant to apply to receipt or possession. The government's contrary interpretation necessitates the conclusion that Congress, while prohibiting intrastate receipt and possession, proscribed interstate but not intrastate transportation. Since it is virtually impossible to have an act of transporting, whether intrastate or interstate, without an accompanying receipt or possession, the government's construction

is unsound because, as the government concedes, it requires that the interstate commerce requirement as to transportation be read out of the statute. The court of appeals was on firmer ground, however, in declining to assume, on the meager legislative record before it, that a clause as significant as "in commerce or affecting commerce" could be so cavalierly disposed of, given Congress' traditional reliance on that phrase in other federal criminal statutes.

The court of appeals' narrow interpretation also conforms to the Court's decisions in *United States v. Denmark*, 346 U.S. 441 (1953) and *Rewis v. United States*, 401 U.S. 808 (1971), where the Court also narrowly construed ambiguous criminal statutes enacted under the Commerce Clause. The reasons the Court gave—that the rule of lenity required narrow construction of ambiguous penal statutes, that the consequences of an expansive reading to State-federal relationships and to federal law enforcement resources required a clear expression of Congressional intent and, that determination of the constitutionality of an act of Congress was to be avoided, if possible—all support the disposition below.

B.

Congressional power to regulate local activity under the Commerce Clause is not unlimited. Regulation of simple receipt or possession of a firearm locally by a prior felon exceeds constitutional limitations. Mere receipt or possessions is passive criminal conduct and far removed from any connection with interstate or any other form of commerce. If Congress may regulate such conduct on the rationale that guns are instrumentalities of criminal acts which, though local in nature, affect interstate commerce, then it may also enact a general body of criminal law that would regulate all types of purely local criminal conduct, rendering meaningless the term "Commerce."

Perez v. United States, 402 U.S. 146 (1971), is easily distinguishable because loan-sharking was itself found by Con-

gress to be carried on substantially in interstate and foreign commerce and to contribute heavily to the coffers of organized crime which was interstate and international in character. The local loan-sharking activities involved in *Perez* were subsidiary to the larger class of interstate loan-sharking clearly within Congress' Commerce Clause powers. Moreover, local loan-sharking was itself connected to interstate crime and was commercial by its very nature. Mere receipt or possession of a firearm, however, is not part of a larger class of weapons possession having interstate characteristics nor is it even commercial activity. The government's reliance on statistics tending to show the economic cost of ordinary crime as furnishing a rational basis for Congress' power to prohibit receipt or possession of a weapon is misplaced. Congress has never been accorded the power to regulate purely local criminal conduct, such as robbery, burglary or homicide, a step which it has not taken, and yet one which is at least closer to an effect upon interstate commerce than is the mere anticipatory act of receipt or possession of a firearm.

C.

Section 1202(c)(2) violates due process and equal protection of the laws by defining "felony" as a crime classified under State law as a felony or a misdemeanor punishable by more than two years' imprisonment. As the definition of crimes varies greatly among the States, a person committing the same previous crime as respondent, but in a State which deemed it neither a felony nor a misdemeanor punishable by more than two years imprisonment would not be prosecutable under Title VII. As this permits of an unequal and arbitrary application of the law, it is unconstitutional.

ARGUMENT

POINT I

THE LANGUAGE OF SECTION 1202(a)(1) DOES NOT, WITH REQUISITE CLARITY, ESTABLISH THAT CONGRESS INTENDED TO DISPENSE WITH PROOF IN AN INDIVIDUAL CASE THAT A FELON'S POSSESSION OF A FIREARM WAS "IN COMMERCE OR AFFECTING COMMERCE." SUCH AMBIGUITY REQUIRES A NARROW CONSTRUCTION BECAUSE THE STATUTE IS PENAL IN NATURE AND A BROADER INTERPRETATION ALSO RAISES A SERIOUS DOUBT AS TO ITS CONSTITUTIONALITY.

(a)

There can be little quarrel as to the ambiguity of section 1202(a)(1). The government itself acknowledges that it is not "a model of logic or clarity." (pet. for cert., p. 5). And the divergence of opinion among the various district courts as well as the difference of opinion between the Second Circuit and the four other circuit courts of appeal on the issue is ample evidence of that ambiguity.[1] Even several district courts which have accepted the government's interpretation, have done so haltingly.[2]

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[1] *United States v. Harbin*, 313 F. Supp. 50, 51 (N.D. Ind. 1970) ["The statutory language strikes the Court as neutral. No matter which construction is adopted, the statute reads badly because of the words 'affecting commerce'."]; *Accord, United States v. Phelps*, No. CR-14465 (M.D. Tenn., February 10, 1970); *United States v. Steed*, No. CR 70-57 (W.D. Tenn., May 11, 1970); *United States v. Francis*, No. CR-12,684 (E.D. Tenn., December 18, 1969); *United States v. Bass*, 434 F.2d 1296 (2d Cir. 1970) [this case]. *Contra, United States v. Vicary*, No. CR 44,205 (E.D. Mich., June 29, 1970) (*en banc*); *United States v. Childress*, No. 8039-R (E.D. Va., January 6, 1969); *United States v. Cabbler*, 429 F.2d 577 (4th Cir., 1970); cert. den. 400 U.S. 901; *United States v. Synnes*, 438 F.2d 764 (8th Cir. 1971); *United States v. Daniels*, 431 F.2d 697 (9th Cir., 1970); *Stevens v. United States*, 440 F.2d 145 (6th Cir., 1971).

[2] *United States v. Davis*, 314 F. Supp. 1161, 1166 (N.D. Miss. 1970); *United States v. Wiley*, 309 F. Supp. 141, 142 (N.D. Minn. 1970).

Confronted with the task of construing a statute that had been enacted with little discussion among the members of Congress, and which had been neither the subject of Congressional hearings nor even committee report, the court of appeals placed primary emphasis on the language and internal consistency of the statute itself. As the court's opinion points out, to do otherwise would render meaningless, in several respects, Congress' inclusion of the phrase "in commerce or affecting commerce":

> Interpreting the commerce requirement to modify only the "transports" clause means that, although intrastate receipt and possession are punishable under the statute, intrastate transportation is not. Moreover if both "receipt" and "possession" are punishable without regard to the interstate elements, the modifying clause is meaningless, since there can scarcely be "transportation" whether intrastate or interstate, without an accompanying receipt or possession. Thus, in order to argue that a commerce requirement is not imposed by the statute on "receipt" or "possession," the government is forced to take the position that the commerce requirement of the statute is either totally illogical or mere surplusage. (App. 63).

The government seeks to refute the logic of the court's analysis in several ways.[3] First it is urged that

> an argument can be made that the transportation prohibition of that section includes a prohibition against

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[3]Little need be said about the government's reliance on ordinary rules of statutory construction, such as the "last antecedent" rule which, because of the absence of a comma following the word "transports," the government suggests dictates that only that term is modified by the phrase "in commerce or affecting commerce." Even the district court, which sustained the government's position, cautioned, that "as is often the case * * * there is a contradictory canon in defendant's arsenal. * * * The battle of canons and commas leave us to seek for clues more promising to the legislative meaning." (App. 56). The canon which respondent relied on below, *ejusdem generis*, is equally applicable. See, *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920).

> causing a firearm to be transported—an act that can be effected without receiving or possessing the firearm

and thus

> Congress *might have felt* that the broader scope of the term "transports" as compared to the terms "receives" or "possesses" justified its qualification by the interstate commerce requirement. (emphasis ours)
>
> (pet's. br., pp. 14-15)

The government's argument is speculative and casts little light on the problem of construction here presented. For even granting, *arguendo*, the government's premise that Congress meant to include the act of "causing a firearm to be transported," it does not follow that a Congress, intent on outlawing simple intrastate receipt and possession, would have sought to prohibit the "causing" of only interstate transportation of a firearm. Given the four-pronged nature of the findings set forth in section 1201, which the government specifically relies on as evincing an intent to dispense with proof of an interstate commerce element, the act of causing a firearm to be transported intrastate is no less an evil than intrastate receipt or possession.

Recognizing the tenuousness of its argument, the government next asserts that the court of appeals' interpretation "suffered from a more serious defect in that it did not take into account the provisions of Title IV of the very same act of which the present statute was a part" and thus relegated Title IV to "virtual redundancy." (Pet. br., p. 15). Of course, the government concedes that to avoid this "redundancy" this Court would have to read the commerce requirement as to transportation out of the statute. *Id.*, at 17.

Given the last minute nature of Senator Long's amendment, the absence of even minimal Congressional evaluation of it in hearings or committee report (especially with respect to its relationship to other firearm provisions), and the belief by at least one of the few members of Congress who discussed the amendment (Rep. Pollock) that the bill meant to include proof of an interstate commerce nexus

[114 Cong. Rec. 16,298], the court of appeals was correct in deducing that

> [i]t is considerably more probable that the commerce language was inserted to avoid questions of the scope of Congressional power and to mirror the approach to federal criminal jurisdiction reflected in many other federal statutes. (App. 63).

The court's reasoning is firmly based. First, it is significant that several weeks after section 1202(a) was enacted, Congress extensively debated legislation that would have made it a federal offense to commit a crime of violence with a weapon that could be proven to have been in interstate commerce. Thus, even after passage of section 1202(a), Congress was still concerned with the necessity of requiring proof in every case that the instrumentality of the crime had actually moved in interstate commerce.[4]

Secondly, absent proof of an interstate commerce nexus for receipt or possession in each case, section 1202(a) radically intrudes upon traditional state criminal jurisdiction. The court of appeals' interpretation is consistent with the language employed and does not require excision of a term of art—"in commerce or affecting commerce"—of critical significance to our federal system. Thus it respects the sensitive relation between federal and state criminal jurisdiction to which this Court has consistently deferred when not *clearly* instructed by Congress to do otherwise. *Rewis*

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[4]On July 17, 1968, Congress debated H.R. 6137, an amendment proposed by Representative Casey of Texas (but not adopted) to H.R. 17735, subsequently enacted as the Gun Control Act of 1968. That bill provided that a person would be guilty of a federal offense if, during the course of committing any robbery, assault, murder, rape, burglary, kidnaping, or homicide other than involuntary manslaughter, he used or carried any firearm which has been transported in interstate or foreign commerce. 114 Cong. Rec. 21765-21770, 21778-9.

v. United States, 401 U.S. 808 (1971); *United States v. Denmark*, 346 U.S. 441, 447-8 (1953).[5]

In *Rewis*, the Court was presented with a statute which, if broadly construed, would have supported a conviction under Federal law for the operation of a local lottery to which persons sometimes traveled across state lines. The legislative history of that statute was limited and, as here, silent on the implications of rendering traditionally local activity a federal crime. Thus, in language applicable to this case the Court, in addition to expressing its concern with the sensitivity of federal-state relationships, wrote of its awareness of the problem of increased extension of federal enforcement obligations:

> In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of § 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State. 401 U.S. at 812.

---

[5]Indeed, many years ago, Mr. Justice Frankfurter, discussing techniques of construing federal regulatory statutes, especially those enacted under the commerce power, cautioned that

> [t]he task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947).

In the instant case, the broad construction urged by the government renders traditionally local criminal conduct, already prosecutable under the laws of a majority of States,[6] a matter for federal enforcement which, as in *Rewis*, would involve a substantial extension of federal police resources. As the government's petition for a writ of certiorari pointed out, at least 150 prosecutions had already been brought between June 19, 1968, the date of enactment, and January 29, 1971, the date the petition was filed. (pet. for cert, p. 4). Undoubtedly more such prosecutions have since been instituted.[7] Certainly before it sanctions any expansion of the reach of federal police power the Court, as it has previously done, should require a much clearer statement of intent from Congress than is present here.

(b)

In narrowly construing section 1202, the court of appeals did not pause to consider, as have several district courts,[8] yet another rule of construction that supports its judgment: the rule that a penal statute should be narrowly construed, or the rule of lenity.

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[6]See the useful, but not exhaustive survey in Geisel, Roll, and Wettick, *The Effectiveness of State and Local Regulation of Handguns, A Statistical Analysis,* 1969 Duke L.J. 646, 652-655.

[7]When the Casey Amendment (ante, n. 4), which also would have expanded federal jurisdiction over local crimes, was debated, opponents of the bill such as Representative Smith of California, Representative Celler of New York and then Attorney General Clark, expressed concern that the tremendous numbers of local crimes now dealt with under the police powers of the States would require investigation and prosecution by Federal law enforcement officers. 114 Cong. Rec. 21770, 21778-9. Most recently, Attorney General Mitchell warned that broadening federal jurisdiction in general criminal matters could lead to a national police force to which the present administration was opposed for fear of its use as a political weapon. *N.Y. Post,* July 27, 1971, p. 11, col. 1.

[8]*United States v. Harbin, supra,* n. 1, 313 F. Supp. at 51; *United States v. Phelps, supra,* n. 1; *United States v. Steed, supra,* n. 1; *United States v. Francis, supra,* n. 1.

Section 1202(a) is a penal statute. Its ambiguous nature is evident and well documented. See p. 7, *ante*. While the rule of lenity serves only as a means of resolving an ambiguity, not of begetting one,[9] ambiguity in a penal statute to the degree manifested in section 1202(a)(1) has been consistently deemed by the Court to require a construction in the defendant's favor. See, *Bell v. United States*, 349 U.S. 81, 83 (1955); *United States v. Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221 (1952); *Ladner v. United States*, 358 U.S. 169, 177 (1958); *Heflin v. United States*, 358 U.S. 415 (1959); *Prince v. United States*, 352 U.S. 322 (1957); see also, *Federal Trade Commission v. Mandel Bros.*, 359 U.S. 385, 389 (1959).

Again, the *Rewis* and *Denmark* cases are exceptionally apposite. Both cases involved a question of statutory construction where the government's interpretation would have greatly expanded federal criminal jurisdiction via the Commerce Clause to include conduct not previously within the recognized scope of that clause. In both cases, such interpretation was not an unreasonable one. However, because Congress, in the Court's view, had not clearly resolved to have the respective statutes reach their asserted broad expanse and because the statutes were penal in nature, a narrow reading was required: "our policy in constitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation." *United States v. Denmark*, *supra*, 346 U.S. at 449. "And even if this lack of support [for a broader reading] were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, *supra*, 401 U.S. at 812.

Lastly, another basic principle of constitutional adjudication adhered to by the court of appeals is that a statute is to be construed in a manner which avoids determination of

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[9] *Callanan v. United States*, 364 U.S. 587, 596 (1961).

a serious constitutional question unless the statutory language leaves no reasonable alternative. *United States v. Denmark, supra,* 346 U.S. at 448-49; *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 348 (1936) (Mr. Justice Brandeis concurring); *United States v. Standard Brewery,* 251 U.S. 210, 220 (1920).

For the reasons already given, we believe the court of appeals' construction of the statute, while not the only possible reading, is the most reasonable one. Only this construction allows pretermission of the serious question of Congress' power under the Commerce Clause to punish simple possession of a firearm without proof of a commerce nexus. We devote Point II of our brief to a discussion of why we believe Congress lacks such plenary power.

POINT II

THE COMMERCE CLAUSE DOES NOT AFFORD CONGRESS AUTHORITY TO PROHIBIT MERE POSSESSION OF A FIREARM BY A PRIOR FELON.

"Scholastic reasoning," the Court has cautioned, "may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity." *Polish National Alliance v. Labor Board,* 322 U.S. 643, 650 (1944). Though vast, Congress' power under the Commerce Clause is not, therefore, unlimited. See also, *United States v. Denmark,* 346 U.S. 441, 462 (1953); Stern, *The Problems of Yesteryear—Commerce and Due Process,* 4 Vand. L. Rev. 446, 463 (1951).

The instant statute constitutes an unprecedented expansion of federal criminal jurisdiction through the guise of the Commerce Clause. If it were sustained, Congress would be deemed possessed of plenary power to enact a general body of criminal law which could encompass every type of ordinary local criminal activity. On the spectrum of criminal conduct, however, simple possession of a firearm is the most passive of criminal acts and entirely remote from a con-

nection with interstate, or even intrastate commerce. If Congress may determine, nonetheless, that possession *simpliciter* constitutes a *per se* burden on interstate commerce because a firearm may be employed in a crime, then Congress would certainly have the power to make any act committed with the weapon, be it robbery, assault or homicide, a federally prosecutable offense. No decision construing the Commerce Clause has ever gone so far. No statute has ever purported to assert such power.

While the purpose of prior Congressional regulation has not always been commercial, it has always been commerce that was regulated. In section 1202, Congress seeks to regulate items which may no longer be and perhaps never were involved in interstate commerce and persons who in no way engage in commercial activity or even activity affecting commerce. Read in conjunction with those powers reserved to the States under the Tenth Amendment, the meaning of the term "Commerce" in Article I, Section 8 of the Constitution becomes senseless if stretched to cover such passive local conduct.[10]

The government's heavy reliance on *Perez v. United States*, 402 U.S. 146 (1971), is not well-founded. *Perez* is a markedly different case in that it involved a "class of activities" —loan-sharking—which Congress, after due deliberation, found was "carried on to a substantial extent in interstate and foreign commerce." 402 U.S. at 147, n. 1. Congress

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[10]Cf. *White v. United States*, 395 F.2d 5 (1st Cir.), cert. den. 393 U.S. 928 (1968), a case heavily relied upon by the government below. The Second Circuit harmonized *White* with this case by noting that the First Circuit, in sustaining Congress' power to regulate possession of depressant and stimulant drugs, "itself recognized the distinct problems inherent in the field of drug regulation," when it wrote:

> 'unlike many other objects of federal regulation, depressant and stimulant drugs are not an inert, passive substance, which after use, pass into the realm of statistics of consumption. They exert an influence on the consumer, which may spell danger or disaster for people or property from or in other states.' 395 F.2d at 7. (App. 66)

also found that extortionate credit transactions constituted a substantial portion of the income of organized crime which itself was interstate and international in character. *Ibid.*

Thus loan-sharking was easily encompassed within traditional Commerce Clause concepts. The means and instrumentalities of interstate commerce were heavily involved and loan-sharking was supportive of a criminal network which itself heavily traversed state boundaries. All that remained for the Court to decide was the legitimacy of Congress' regulation of those extortionate credit transactions which were intrastate and merely ancillary to the larger class of interstate loan-sharking activities. The Court resolved the matter primarily by reference to its prior decisions in which the overriding interstate quality of the bulk of the activities regulated supplied the justification for regulation of secondary intrastate activities. Without such regulation, the otherwise legitimate regulatory scheme would have been thwarted.[11]

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[11] In *United States v. Darby*, 312 U.S. 100 (1941), the Court sustained a statute which excluded from interstate commerce all goods not manufactured under specified labor standards, essentially a valid exercise of Congress' power to prohibit transportation of products across state lines. Moreover, Darby's violation of the provisions of the Act could be punished only if the Government could prove that the employees affected produced goods intended for shipment or actually shipped in interstate commerce.

In *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), the Court held that Congress could provide for the regulation of milk sold intrastate because it affected the general price structure and thus federal regulation of milk sold interstate.

Similarly, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court accepted the government's contention that local wheat consumption affected federal regulation of interstate wheat consumption.

[Footnote continued]

Unlike local loan-sharking, however, mere possession of a firearm, even by a prior felon, is not a class of activities ancillary to a larger class which in turn has an effect upon interstate commerce by virtue of its interstate characteristics. Congress did not find that such possession supported a network of crime carried on across state lines, nor that it was supportive of organized crime which itself had metastasized across state and even national boundaries. Thus, to the extent that the regulation of local loan-sharking in *Perez* was permissible because the far greater portion of loan-sharking was itself interstate in nature, there is no corresponding similarity here.

Had Congress legislated solely against intrastate loan sharking pursuant to its finding that "(e)ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce," [402 U.S. at 147, n. 1] approval of that effort would still not validate the instant statute. In sustaining Congress' power to regulate purely intrastate loan sharking activities, the Court in *Perez* still emphasized the link between such activities and interstate and organized crime:

[continued]

In *Katzenbach v. McClung*, 379 U.S. 294 (1964), although the Court noted the effect of exclusion of Negroes from restaurants on interstate commerce, the government still had to prove that the restaurant in question "serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce."

In *Maryland v. Wirtz*, 392 U.S. 183 (1968), the government again was required to demonstrate the connection between the defendant's activities and interstate commerce. By the terms of the Fair Labor Standards Act itself, the employers regulated are engaged in commerce or production for commerce and the Court emphasized that the amendment did not change the class of employers affected but merely extended the Act to cover employees originally exempted. 392 U.S. at 193.

Only *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) supports the proposition that purely intrastate activity may be viewed as having an effect on interstate commerce. However, the clear and

> In the setting of the present case, there is a tie-in between local loan sharks and interstate crime.
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> * * *
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> . . . loan sharking, in its national setting is one way organized crime holds its guns to the heads of the poor and rich alike and syphons funds from numerous localities to finance its national operations. 402 U.S. at 157.

Moreover, even if one focuses on the nature of loan shark itself without regard to its tie-in to interstate crime, a rational basis for Congress' action can easily be found in the very commercial nature of loan-sharking as a credit extending device with its concomitant coercive impact on legitimate businesses. Indeed, Miranda, the victim in *Perez* was required to close his butcher shop because of his inability to meet the extortionate payments demanded by Perez. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

Only the "scholastic reasoning" against which the Court warned in *Polish National Alliance, supra*, 322 U.S. 643, however, can stretch the rational basis test of *Perez* and its predecessors to encompass simple possession of a firearm. The government is forced to the strained position of finding a Congressional basis for regulating mere possession of a firearm in the possibility that the passive state of possession may become a criminal act which in turn will exert an effect upon interstate commerce. Congress has not even attempted, however, to deal with such acts, presumably because they are well within the realm of state criminal jurisdiction. Thus, only the most attenuated reasoning can effect a constitutional connection between possession of a firearm and interstate commerce. Nonetheless, it is this intellectual leap, from possession to effect on interstate commerce that the government proposes as all that is necessary to sustain Congressional power in this case.

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immediate effect upon interstate commerce of the lack of available accommodations to Negro travelers, well documented in the hearings before Congress, would seem self-evident.

Since there were no hearings prior to the enactment of section 1202, the government refers the Court to the fact that Congress, at a time other than when it was contemplating passage of section 1202, had before it facts which showed that the yearly economic cost of homicide is estimated at $750,000,000 and that of robbery, burglary, larceny, and auto theft at $600,000,000. (pet. br., p. 21) The relevance of these statistics, however, is not apparent—unless the Court will underwrite the notion that the economic cost of local crimes alone places them within the commerce power. But this Court has never sanctioned the regulation of ordinary criminal activity such as homicide, robbery or non-interstate auto theft. Indeed, as the defeat of the Casey Amendment (*ante*, n. 4) demonstrates, Congress has declined to regulate this traditional type of local criminal conduct even when committed with a weapon that has moved in interstate commerce. Through section 1202(a)(1), however, Congress has bypassed the intermediate step (outlawing the conduct which creates the alleged impact on commerce) and has proceeded to regulate the anticipatory and therefore much more remote act of possession. To conclude that interstate commerce is affected in this fashion in a meaningful constitutional sense, especially on the most silent of legislative records, is sheer hyperbole. In short, there is no rational basis for Congress' action in this case.

POINT III

THE DEFINITION OF "FELONY" CONTAINED IN 18 U.S.C. APP. (SUPP. V) 1202(c)(2) VIOLATES DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BECAUSE IT DEFINES PREDICATE CULPABILITY ACCORDING TO STATE FELONY-MISDEMEANOR CLASSIFICATIONS AND THUS PERMITS IDENTICAL CRIMINAL ACTS TO SERVE AS A BASIS FOR CONVICTION WHEN DEFINED BY STATE LAW AS FELONIES OR MISDEMEANORS PUNISHABLE BY MORE THAN TWO YEARS' IMPRISONMENT BUT NOT WHEN CLASSIFIED AS LESSER CRIMES IN OTHER STATES.

Respondent could not have been convicted under section 1202(a)(1) unless the government alleged and proved that he had previously been convicted of a "felony." Section 1202(c)(2) defines "felony" as

> . . . any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less.

This classification is violative of the equal protection clause,[12] because it renders subject to conviction a person who possesses a gun and has been convicted of a felony in one state while permitting another person who possesses a gun and who has committed the identical act in another state which classifies that offense as a misdemeanor punishable by no more than two years' imprisonment to be immune from federal prosecution.

In this case, it was stipulated that respondent had previously been convicted in the State of New York of the crime of attempted grand larceny in the second degree (involving the attempted theft of property exceeding the value of

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[12] Applicable to the federal government through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

$1500) a felony under New York law. New York Penal Law, §§ 110.05, 155.35. Throughout the country, however, categories of offenses classified as misdemeanors and felonies vary and an offense which is a felony or serious misdemeanor in one state may be a lesser offense in another. See, President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS 30 (1967); *District of Columbia v. Colts,* 282 U.S. 63 (1930). Thus, a person committing the same crime as respondent in California (attempted grand theft), for example, would be guilty of a misdemeanor punishable by less than two years' imprisonment if sentenced to a term in county jail rather than State prison and he would not be prosecutable under Title VII.[13]

There are many other examples of this felony-misdemeanor variance. For example, stealing property valued at $150.00 is a misdemeanor in New York,[14] a felony in Louisiana,[15] a misdemeanor in North Carolina,[16] and a felony in New Mexico.[17] A person convicted of stealing $50.00 in Wyoming, Texas, or Pennsylvania, would be guilty of a felony.[18] However, if $50.00 were stolen in Wisconsin the thief could be convicted of a misdemeanor only.[19] This variance also applies to crimes outside the larceny category. For example, one who is convicted of prostitution for a third time in North Carolina is guilty of a misdemeanor,[20] but a felony if the same offense is committed in Connecticut.[21]

[13]Calif. Pen. Code, §§ 17, 487, 489, 664 (West, 1970).

[14]New York Penal Law, § 155.25.

[15]La. Stat. Ann. R.S. 14:2, 14:67.

[16]N.C. Gen. Stat., § 14-72.

[17]N.M. Stat. § 40A-16-1.

[18]3 Wyo. Stat. Ann.; § 6-132; Texas Pen. Code, Art. 1421; 18 Purdon's Penna. Stat. Ann. § 4807.

[19]Wis. Stat. Ann. § 943.20.

[20]N.C. Gen. Stat. § 14-207.

[21]Conn. Gen. Stat. Ann. §§ 1-1, 53-226.

Section 1202(c)(2) thus possesses a constitutional defect similar to that of the Oklahoma sterilization statute struck down in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In declaring that the statute's distinction between larcenists and embezzlers for the purpose of sterilization was irrational, the Court condemned the law's laying of an "unequal hand on those who have committed intrinsically the same quality of offense." *Id.* at 541. Yet this is precisely what section 1202(c)(2) authorizes by allowing persons who have committed identical prior criminal acts to be prosecutable under section 1202 only if the State in which that act took place chooses to label it a felony or a misdemeanor punishable by more than two years.

Although Congress undoubtedly faced a problem of draftsmanship in attempting to straddle the differing classifications of crime among the States, it chose a method of definition that fails to avoid great disparity in treatment for the same criminal conduct.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the Court below be affirmed.

Respectfully submitted,

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On the Brief:

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UNITED STATES *v.* BASS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70–71. Argued October 18, 1971—Decided December 20, 1971

Respondent was convicted of possessing firearms in violation of § 1202 (a)(1) of the Omnibus Crime Control and Safe Streets Act, which provides that a person convicted of a felony "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm . . ." shall be punished as prescribed therein. The indictment did not allege and no attempt was made to show that the firearms involved had been possessed "in commerce or affecting commerce," the Government contending that the statute does not require proof of a connection with interstate commerce in individual cases involving possession or receipt. Doubting its constitutionality if the statute were thus construed, the Court of Appeals reversed. *Held:* It is not clear from the language and legislative history of § 1202 (a)(1) whether or not receipt or possession of a firearm by a convicted felon has to be shown in an individual prosecution to have been connected with interstate commerce. The ambiguity of this provision (which is not only a criminal statute but one whose broad construction would define as a federal offense conduct readily proscribed by the States), must therefore be resolved in favor of the narrower reading that a nexus with interstate commerce must be shown with respect to all three offenses embraced by the provision. Pp. 339–351.

434 F. 2d 1296, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN (except for Part III), STEWART, and WHITE, JJ., joined. BRENNAN, J., filed a separate statement, *post*, p. 351. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 351.

Roger A. Pauley argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wilson, Samuel Huntington,* and *Beatrice Rosenberg.*

William E. Hellerstein, by appointment of the Court, 402 U. S. 927, argued the cause for respondent. With him on the brief was *Phylis Skloot Bamberger*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Respondent was convicted in the Southern District of New York of possessing firearms in violation of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. App. § 1202 (a). In pertinent part, that statute reads:

> "Any person who—
>
> "(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both." [1]

The evidence showed that respondent, who had previously been convicted of a felony in New York State, possessed

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[1] Section 1202 (a) reads in full:

"Any person who—

"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

"(2) has been discharged from the Armed Forces under dishonorable conditions, or

"(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

"(4) having been a citizen of the United States has renounced his citizenship, or

"(5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

on separate occasions a pistol and then a shotgun. There was no allegation in the indictment and no attempt by the prosecution to show that either firearm had been possessed "in commerce or affecting commerce." The Government proceeded on the assumption that § 1202 (a)(1) banned all possessions and receipts of firearms by convicted felons, and that no connection with interstate commerce had to be demonstrated in individual cases.

After his conviction,[2] respondent unsuccessfully moved for arrest of judgment on two primary grounds: that the statute did not reach possession of a firearm not shown to have been "in commerce or affecting commerce," and that if it did, Congress had overstepped its constitutional powers under the Commerce Clause. 308 F. Supp. 1385. The Court of Appeals reversed the conviction, being of the view that if the Government's construction of the statute were accepted, there would be substantial doubt about the statute's constitutionality. 434 F. 2d 1296. We granted certiorari to resolve a conflict among lower courts over the proper reach of the statute.[3] We affirm the judgment of the court below,

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[2] Respondent was acquitted on another count charging him with carrying a firearm during the commission of a felony (the sale of a narcotic drug), a federal offense under 18 U. S. C. § 924 (c)(2).

[3] At this date, six Circuits and numerous district courts have decided the issue. The Government's view was adopted in *United States* v. *Cabbler*, 429 F. 2d 577 (CA4 1970), cert. denied, 400 U. S. 901; *United States* v. *Donofrio*, No. 71-1215 (CA5 Nov. 11, 1971); *Stevens* v. *United States*, 440 F. 2d 144 (CA6 1971) (one judge dissenting); *United States* v. *Synnes*, 438 F. 2d 764 (CA8 1971); *United States* v. *Daniels*, 431 F. 2d 697 (CA9 1970). The result reached by the Second Circuit in this case has also been reached in *United States* v. *Harbin*, 313 F. Supp. 50 (ND Ind. 1970); *United States* v. *Steed*, No. CR 70-57 (WD Tenn., May 11, 1970); *United States* v. *Phelps*, No. CR 14,465 (MD Tenn., Feb. 10, 1970); *United States* v. *Francis*, No. CR 12,684 (ED Tenn., Dec. 12, 1969).

but for substantially different reasons.[4] We conclude that § 1202 is ambiguous in the critical respect. Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress.

I

Not wishing "to give point to the quip that only when legislative history is doubtful do you go to the statute," [5] we begin by looking to the text itself. The critical textual question is whether the statutory phrase "in commerce or affecting commerce" applies to "possesses" and "receives" as well as to "transports." If it does, then the Government must prove as an essential element of the offense that a possession, receipt, or transportation was "in commerce or affecting commerce"—a burden not undertaken in this prosecution for possession.

While the statute does not read well under either view, "the natural construction of the language" suggests that the clause "in commerce or affecting commerce" qualifies all three antecedents in the list. *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U. S. 345, 348 (1920). Since "in commerce or affecting commerce" undeniably

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[4] In light of our disposition of the case, we do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the "mere possession" of firearms; thus, we need not consider the relevance, in that connection, of our recent decision in *Perez* v. *United States*, 402 U. S. 146 (1971). The question whether the definition of "felony" in § 1202 (c)(2) creates a classification violating the Fifth Amendment was not raised in the Government's Petition for Certiorari, and is also not considered here.

[5] Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 543 (1947).

applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three. But although this is a beginning, the argument is certainly neither overwhelming nor decisive.[6]

In a more significant respect, however, the language of the statute does provide support for respondent's reading. Undeniably, the phrase "in commerce or affecting commerce" is part of the "transports" offense. But if that phrase applies *only* to "transports," the statute would have a curious reach. While permitting transportation of a firearm unless it is transported "in commerce or affecting commerce," the statute would prohibit all possessions of firearms, and both interstate and intrastate receipts. Since virtually all transportations, whether interstate or intrastate, involve an accompanying possession or receipt, it is odd indeed to argue that on the one hand the statute reaches all possessions and

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[6] Compare *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 218 (1920), with *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 389–390 (1959); see also 2 J. Sutherland, Statutory Construction § 4921 (3d ed. 1943); K. Llewellyn, The Common Law Tradition 527 (1960).

The Government, noting that there is no comma after "transports," argues that the punctuation indicates a congressional intent to limit the qualifying phrase to the last antecedent. But many leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary. See, *e. g.*, B. Evans & C. Evans, A Dictionary of Contemporary American Usage 103 (1957); M. Nicholson, A Dictionary of American-English Usage 94 (1957); R. Copperud, A Dictionary of Usage and Style 94–95 (1964); cf. W. Strunk & E. White, The Elements of Style 1–2 (1959). When grammarians are divided, and surely where they are cheerfully tolerant, we will not attach significance to an omitted comma. It is enough to say that the statute's punctuation is fully consistent with the respondent's interpretation, and that in this case grammatical expertise will not help to clarify the statute's meaning.

receipts, and on the other hand outlaws only interstate transportations. Even assuming that a person can "transport" a firearm under the statute without possessing or receiving it, there is no reason consistent with any discernible purpose of the statute to apply an interstate commerce requirement to the "transports" offense alone.[7] In short, the Government has no convincing explanation for the inclusion of the clause "in commerce or affecting commerce" if that phrase only applies to the word "transports." It is far more likely that the phrase was meant to apply to "possesses" and "receives" as well as "transports." As the court below noted, the inclusion of such a phrase "mirror[s] the approach to federal criminal jurisdiction reflected in many other federal statutes." [8]

Nevertheless, the Government argues that its reading is to be preferred because the defendant's narrower interpretation would make Title VII redundant with Title IV of the same Act. Title IV, *inter alia*, makes it a

[7] The Government urges that "transports" includes the act of "causing a firearm to be transported," and therefore would connote an offense separate in some cases from "receives" or "possesses." From this, the Government argues that "Congress might have felt that the broader scope of the term 'transports,' as compared to the terms 'receives' or 'possesses,' justified its qualification by the interstate commerce requirement." Govt. Brief 14–15. The Government's view about the comparative breadth of the various offenses certainly does not follow from its definition of "transports." But beyond that, its argument about what Congress "might have felt" is purely speculative, and finds no support in any arguable purpose of the statute. There is certainly no basis for concluding that Congress was less concerned about the transporting and supplying of guns than their acquisition.

[8] 434 F. 2d, at 1298. See, *e. g.*, 18 U. S. C. § 2421 (prostitution); 18 U. S. C. § 1952 (Travel Act); 18 U. S. C. § 1951 (robbery and extortion); 18 U. S. C. § 1231 (strikebreaking); 18 U. S. C. § 1201 (kidnaping); 18 U. S. C. § 1084 (gambling); 18 U. S. C. § 842 (i) (explosives); 15 U. S. C. § 1 *et seq.* (antitrust); 15 U. S. C. § 77e (securities fraud).

crime for four categories of people—including those convicted of a crime punishable for a term exceeding one year—"to ship or transport any firearm or ammunition in interstate or foreign commerce . . . [or] to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U. S. C. §§ 922 (g) and (h). As Senator Long, the sponsor of Title VII, represented to Senator Dodd, the sponsor of Title IV, Title VII indeed does complement Title IV. 114 Cong. Rec. 14774; see also 114 Cong. Rec. 16286. Respondent's reading of Title VII is fully consistent with this view. First, although subsections of the two Titles do address their prohibitions to some of the same people, each statute also reaches substantial groups of people not reached by the other.[9] Secondly, Title VII complements Title IV by punishing a broader class of behavior. Even under respondent's view, a Title VII offense is made out if the firearm was possessed or received "in commerce or affecting commerce"; however, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is

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[9] Title VII limits the firearm-related activity of convicted felons, dishonorable dischargees from the Armed Services, persons adjudged "mentally incompetent," aliens illegally in the country, and former citizens who have renounced their citizenship. See n. 1, *supra*. A felony is defined as "any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less . . . ." 18 U. S. C. App. § 1202 (c) (2).

Title IV reaches persons "under indictment for, or . . . convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"; fugitives from justice; users or addicts of various drugs; persons adjudicated as "mental defective[s] or . . . committed" to a mental institution. 18 U. S. C. §§ 922 (g) and (h).

limited to the sending or receiving of firearms as part of an interstate transportation.[10]

In addition, whatever reading is adopted, Title VII and Title IV are, in part, redundant. The interstate commerce requirement in Title VII minimally applies to transportation. Since Title IV also prohibits convicted criminals from transporting firearms in interstate commerce, the two Titles overlap under both readings. The Government's broader reading of Title VII does not eliminate the redundancy, but simply creates a larger area in which there is no overlap. While the Government would be on stronger ground if its reading were necessary to give Title VII some unique and independent thrust, this is not the case here. In any event, circumstances surrounding the passage of Title VII make plain that Title VII was not carefully molded to complement Title

[10] Title IV, 18 U. S. C. §§ 922 (g) and (h), is a modified and recodified version of 15 U. S. C. §§ 902 (e) and (f) (1964 ed.), 75 Stat. 757, which in turn amended the original statute passed in 1938, 52 Stat. 1250, 1251. Each amendment enlarged the group of people coming within the Act's substantive prohibitions against transportation or receipt of firearms in interstate commerce. The wording of the substantive offense has remained identical, although the original Act had a provision that possession of a firearm "shall be presumptive evidence that such firearm or ammunition was shipped or transported or received [in interstate or foreign commerce]." That presumption was struck down in *Tot* v. *United States*, 319 U. S. 463 (1943), and the Court there noted:

"[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate." *Id.*, at 466.

While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that the 1968 Act changed the prior approach to the "receipt" offense. See, *e. g.*, S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (Apr. 29, 1968).

IV. Title VII was a last-minute Senate amendment to the Omnibus Crime Control and Safe Streets Act. The Amendment was hastily passed, with little discussion, no hearings, and no report.[11] The notion that it was enacted to dovetail neatly with Title IV rests perhaps on a conception of the model legislative process; but we cannot pretend that all statutes are model statutes. While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking. In our view, no conclusion can be drawn from Title IV concerning the correct interpretation of Title VII.

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[11] The Omnibus Crime Control and Safe Streets Act of 1968 started its life as a measure designed to aid state and local governments in law enforcement by means of financial and administrative assistance. See H. R. Rep. No. 488, 90th Cong., 1st Sess. (July 17, 1967). The bill passed the House on August 8, 1967, and went to the Senate. A similar bill was introduced in the Senate (S. 917) and went to the Committee on the Judiciary, which rewrote it completely. See S. Rep. No. 1097, 90th Cong., 2d Sess., *supra*. The amendments included the much-debated provisions regarding the admissibility of confessions, wiretapping, and state firearms control.

On May 17, 1968, Senator Long introduced on the floor his amendment to S. 917, which he designated Title VII. His introductory remarks set forth the purpose of the amendment. 114 Cong. Rec. 13867–13869. About a week later he explained his amendment once again. There was a brief debate; the reaction was favorable but cautious, with "further thought" and "study" being suggested by several favorably inclined Senators who observed some problems with the bill as drafted. Unexpectedly, however, there was a call for a vote and Title VII passed without modification. See 114 Cong. Rec. 14772–14775. The amendment received only passing mention in the House discussion of the bill, 114 Cong. Rec. 16286, 16298, and never received committee consideration or study in the House either.

Other aspects of the meager legislative history, however, do provide some significant support for the Government's interpretation. On the Senate floor, Senator Long, who introduced § 1202, described various evils that prompted his statute. These evils included assassinations of public figures and threats to the operation of businesses significant enough in the aggregate to affect commerce.[12] Such evils, we note, would be most thoroughly mitigated by forbidding every possession of any firearm by specified classes of especially risky people, regardless of whether the gun was possessed, received, or transported "in commerce or affecting commerce." In addition, specific remarks of the Senator can be read to state that the amendment reaches the mere possession of guns without any showing of an interstate commerce nexus.[13] But Senator Long never specifically says that no connection with commerce need be shown in the individual case. And nothing in his statements explains why, if an interstate commerce nexus is irrelevant in individual cases, the phrase "in commerce or affecting commerce" is in the statute at all.[14] But even if Senator

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[12] See 114 Cong. Rec. 13868–13871, 14772–14775.

[13] For example, Senator Long began his floor statement by announcing:

"I have prepared an amendment which I will offer at an appropriate time, simply setting forth the fact that anybody who has been convicted of a felony [or comes within certain other categories] . . . is not permitted to possess a firearm . . . ." 114 Cong. Rec. 13868.

[14] For the same, and additional, reasons, § 1201, which contains the congressional "findings" applicable to § 1202 (a), is not decisive support for the Government. That section reports that:

"The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents,

Long's remarks were crystal clear to us, they were apparently not crystal clear to his congressional colleagues. Meager as the discussion of Title VII was, one of the few Congressmen who discussed the amendment summarized Title VII as "mak[ing] it a Federal crime to take, possess, or receive a firearm across State lines . . . ." 114 Cong. Rec. 16298 (statement of Rep. Pollock).

In short, "the legislative history of [the] Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 483 (1951). Here, as in other cases, the various remarks by legislators "are sufficiently ambiguous insofar as this narrow issue is concerned . . . to invite mutually destructive dialectic," and not much more.

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aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

"(1) a burden on commerce or threat affecting the free flow of commerce,

"(2) a threat to the safety of the President of the United States and Vice President of the United States,

"(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

"(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

The Government argues that these findings would have been "wholly unnecessary" unless Congress intended to prohibit all receipts and possessions of firearms by felons. But these findings of "burdens" and "threats" simply state Congress' view of the constitutional basis for its power to act; the findings do not tell us how much of Congress' perceived power was in fact invoked. That the findings in fact support a statute broader than the one actually passed is suggested by the fact that "in commerce or affecting commerce" does not appear at all in the introductory clause to the "findings," even though § 1202 (a) contains the phrase and concededly reaches only transportations "in commerce or affecting commerce."

FCC v. *Columbia Broadcasting System*, 311 U. S. 132, 136 (1940). Taken together, the statutory materials are inconclusive on the central issue of whether or not the statutory phrase "in commerce or affecting commerce" applies to "possesses" and "receives" as well as "transports." While standing alone, the legislative history might tip in the Government's favor, the respondent explains far better the presence of critical language in the statute. The Government concedes that "the statute is not a model of logic or clarity." Pet. for Cert. 5. After "seiz[ing] every thing from which aid can be derived," *United States* v. *Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C. J.), we are left with an ambiguous statute.

II

Given this ambiguity, we adopt the narrower reading: the phrase "in commerce or affecting commerce" is part of all three offenses, and the present conviction must be set aside because the Government has failed to show the requisite nexus with interstate commerce. This result is dictated by two wise principles this Court has long followed.

First, as we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U. S. 808, 812 (1971). See also *Ladner* v. *United States*, 358 U. S. 169, 177 (1958); *Bell* v. *United States*, 349 U. S. 81 (1955); *United States* v. *Five Gambling Devices*, 346 U. S. 441 (1953) (plurality opinion for affirmance). In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C. I. T. Credit Corp.*,

344 U. S. 218, 221–222 (1952). This principle is founded on two policies which have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931) (Holmes, J.).[15] See also *United States* v. *Cardiff*, 344 U. S. 174 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. Here, we conclude that Congress has not "plainly and unmistakably," *United States* v. *Gradwell*, 243 U. S. 476, 485 (1917), made it a federal crime for

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[15] Holmes prefaced his much-quoted statement with the observation that "it is not likely that a criminal will carefully consider the text of the law before he murders or steals . . . ." But in the case of gun acquisition and possession it is not unreasonable to imagine a citizen attempting to "[steer] a careful course between violation of the statute [and lawful conduct]," *United States* v. *Hood*, 343 U. S. 148, 151 (1952). Of course, where there is a state law prohibiting felons from possessing firearms, as in New York State, N. Y. Penal Law § 265.05 (Supp. 1971–1972), it may be unreal to argue that there are notice problems under the federal law. There are many States, however, that do not have their own laws prohibiting felons from possessing firearms. See Geisel, Roll, & Wettick, The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis, 1969 Duke L. J. 647, 652–653. Since ex-offenders in these States are limited only by the federal gun control laws, the notice problem of that law may be quite real.

a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce.

There is a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.[16] Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.[17] This congressional policy is rooted in the same concepts of American federalism which have provided the basis for judge-made doctrines. See, *e. g., Younger* v. *Harris,* 401 U. S. 37 (1971). As this Court emphasized only last Term in *Rewis* v. *United States, supra,* we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In *Rewis,* we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." While we noted there that "[i]t is not for us to weigh the merits of these factors," we went on to conclude that "the fact

[16] *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 513 (1940); *United States* v. *Five Gambling Devices,* 346 U. S. 441, 449–450 (1953) (plurality opinion); *FTC* v. *Bunte Bros., Inc.,* 312 U. S. 349, 351, 354–355 (1941); Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 539–540 (1947). Cf. *Auto Workers* v. *Wisconsin Board,* 351 U. S. 266, 274–275 (1956); *Palmer* v. *Massachusetts,* 308 U. S. 79, 83–84 (1939); *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220, 225–226 (1957).

[17] H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1241 (tent. ed. 1958).

that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach]." 401 U. S., at 812. In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, § 1202 (a) dramatically intrudes upon traditional state criminal jurisdiction. As in *Rewis*, the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government. Absent a clearer statement of intention from Congress than is present here, we do not interpret § 1202 (a) to reach the "mere possession" of firearms.

III

Having concluded that the commerce requirement in § 1202 (a) must be read as part of the "possesses" and "receives" offenses, we add a final word about the nexus with interstate commerce which must be shown in individual cases. The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person "possesses . . . in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of "receiv[ing] . . . in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.[18] This is

[18] This reading preserves a significant difference between the "receipt" offenses under Title IV and Title VII. See *supra*, at 342–343.

not the narrowest possible reading of the statute, but canons of clear statement and strict construction do "not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett*, 348 U. S. 503, 510 (1955). We have resolved the basic uncertainty about the statute in favor of the narrow reading, concluding that "in commerce or affecting commerce" is part of the offense of possessing or receiving a firearm. But given the evils which prompted the statute and the basic legislative purpose of restricting the firearm-related activity of convicted felons, the readings we give to the commerce requirement, although not all narrow, are appropriate. And consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as an element of all the offenses a requirement suited to federal criminal jurisdiction alone.

The judgment is

Affirmed.

MR. JUSTICE BRENNAN joins the judgment of the Court and the opinion except for Part III. No question of the quantum of evidence necessary to establish the Government's prima facie case is before the Court and he would await a case properly presenting that question before deciding it.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

I cannot join the Court's opinion and judgment. Five of the six United States courts of appeals that have passed upon the issue presented by this case have decided it adversely to the position urged by the respondent here. *United States* v. *Cabbler*, 429 F. 2d 577 (CA4 1970), cert. denied, 400 U. S. 901; *United States* v. *Mullins*,

432 F. 2d 1003 (CA4 1970); *United States* v. *Donofrio*, No. 71–1215 (CA5 Nov. 11, 1971); *Stevens* v. *United States*, 440 F. 2d 144 (CA6 1971) (one judge dissenting); *United States* v. *Synnes*, 438 F. 2d 764 (CA8 1971); *United States* v. *Wiley*, 438 F. 2d 773 (CA8 1971); *United States* v. *Taylor*, 438 F. 2d 774 (CA8 1971); *United States* v. *Daniels*, 431 F. 2d 697 (CA9 1970); *United States* v. *Crow*, 439 F. 2d 1193 (CA9 1971). Only the Second Circuit stands opposed.[1]

1. The statute, 18 U. S. C. App. § 1202 (a), when it speaks of one "who receives, possesses, or transports in commerce or affecting commerce," although arguably ambiguous and, as the Government concedes, "not a model of logic or clarity," [2] is clear enough. The structure of the vital language and its punctuation make it refer to one who receives, to one who possesses, and to one who transports in commerce. If one wished to say that he would welcome a cat, would welcome a dog, or would welcome a cow that jumps over the moon, he would likely say "I would like to have a cat, a dog, or a cow that jumps over the moon." So it is here.

2. The meaning the Court implants on the statute is justified only by the addition and interposition of a comma after the word "transports." I perceive no warrant for this judicial transfiguration.

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[1] Unappealed district court decisions are in conflict. Those upholding the Government's position include *United States* v. *Davis*, 314 F. Supp. 1161 (ND Miss. 1970); *United States* v. *Vicary*, No. CR 44,205 (ED Mich., June 29, 1970) (*en banc*); *United States* v. *Childress*, No. 8039–R (ED Va., Jan. 6, 1969); *United States* v. *Boggs*, No. 8138 (Wyo., June 17, 1970). Those opposed include *United States* v. *Harbin*, 313 F. Supp. 50 (ND Ind. 1970); *United States* v. *Steed*, No. CR 70–57 (WD Tenn., May 11, 1970); *United States* v. *Phelps*, No. CR 14,465 (MD Tenn., Feb. 10, 1970); *United States* v. *Francis*, No. CR 12,684 (ED Tenn., Dec. 12, 1969).

[2] Petition for Cert. 5.

3. In the very same statute the phrase "after the date of enactment of this Act" is separated by commas and undeniably modifies each of the preceding words, "receives," "possesses," and "transports." Obviously, then, the draftsman—and the Congress—knew the use of commas for phrase modification. We should give effect to the only meaning attendant upon that use.

4. The specific finding in 18 U. S. C. App. § 1201 [3] clearly demonstrates that Congress was attempting to reach and prohibit every possession of a firearm by a felon; that Congress found that such possession, whether interstate or intrastate, affected interstate commerce; and that Congress did not conclude that intrastate possession was a matter of less concern to it than interstate possession. That finding was unnecessary if Congress also required proof that each receipt or possession of a firearm was in or affected interstate or foreign commerce.

5. Senator Long's explanatory comments reveal clearly the purpose, the intent, and the extent of the legislation:

> "I have prepared an amendment which I will offer at an appropriate time, simply setting forth the fact that anybody who has been convicted of a felony . . . is not permitted to *possess* a firearm . . . .
>
> "It might be well to analyze, for a moment, the logic involved. When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to *possess* firearms in the future, that man would have no right

[3] "§ 1201. Congressional findings and declaration.

"The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons . . . constitutes—

"(1) a burden on commerce or threat affecting the free flow of commerce . . . ."

to *possess* firearms. He would be punished criminally if he is found in *possession* of them." 114 Cong. Rec. 13868 (emphasis supplied).

"So Congress simply finds that the *possession* of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.

"You cannot do business in an area, and you certainly cannot do as much of it and do it as well as you would like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce." 114 Cong. Rec. 13869 (emphasis supplied).

"What the amendment seeks to do is to make it unlawful for a firearm—be it a handgun, a machine-gun, a long-range rifle, or any kind of firearm—to be in the *possession* of a convicted felon who has not been pardoned and who has therefore lost his right to *possess* firearms. . . . It also relates to the transportation of firearms.

. . . .

"Clauses 1–5 describe persons who, by their actions, have demonstrated that they are dangerous, or that they may become dangerous. Stated simply, they may not be trusted to *possess* a firearm without becoming a threat to society. This title would apply both to hand guns and to long guns.

. . . .

"All of these murderers had shown violent tendencies before they committed the crime for which they are most infamous. They should not have been permitted to *possess* a gun. Yet, there is no Federal law which would deny *possession* to these undesirables.

"The killer of Medgar Evers, the murderer of the three civil rights workers in Mississippi, the defendants who shot Captain Lemuel Penn (on a highway while he was driving back to Washington after completion of reserve Military duty) would all be free under present Federal law to acquire another gun and repeat those same sorts of crimes in the future.

. . . . . .

"So, under Title VII, every citizen could *possess* a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny every assassin, murderer, thief and burglar of *the right to possess* a firearm in the future except where he has been pardoned by the President or a State Governor and has been expressly authorized by his pardon to possess a firearm.

"It has been said that Congress lacks the power to outlaw *mere possession* of weapons. . . .

". . . The important point is that this legislation demonstrates that *possession* of a deadly weapon by the wrong people can be controlled by Congress, without regard to where the police power resides under the Constitution.

"Without question, the Federal Government does have power to control *possession* of weapons where such *possession* could become a threat to interstate commerce . . . .

"State gun control laws where they exist have proven inadequate to bar *possession* of firearms from those most likely to use them for unlawful purposes. . . .

. . . . . .

"Nor would Title VII impinge upon the rights of citizens generally to *possess* firearms for legitimate and lawful purposes. It deals solely with those

> who have demonstrated that they cannot be trusted to *possess* a firearm—those whose prior acts—mostly voluntary—have placed them outside of our society. . . .
>
> . . . . . .
>
> ". . . I am convinced that we have enough constitutional power to prohibit these categories of people from *possessing*, receiving, or transporting a firearm. . . .
>
> . . . . . .
>
> "This amendment would provide that a convicted felon who participates in one of these marches and *is carrying a firearm* would be violating the law. . . ." 114 Cong. Rec. 14773–14774 (emphasis supplied).

One cannot detect in these remarks any purpose to restrict or limit the type of possession that was being considered for proscription.

6. The Court's construction of § 1202 (a), limiting its application to interstate possession and receipt, shrinks the statute into something little more than a duplication of 18 U. S. C. §§ 922 (g) and (h). I cannot ascribe to Congress such a gesture of nonaccomplishment.

I thus conclude that § 1202 (a) was intended to and does reach all possessions and receipts of firearms by convicted felons, and that the Court should move on and decide the constitutional issue present in this case.